STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Hon. Kurtis T. Wilder, Hon. William B. Murphy, Hon. Peter D. O'Connell

GRASS LAKE IMPROVEMENT BOARD,

Petitioner-Appellant,

v

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,

Respondent-Appellee.
_____/

Supreme Court No. _____

Court of Appeals No. 326571
30th Circuit Court No. 2014-1064-AA
Hon. William E. Collette

MAHS Case No. 09-63-0026-P

PETITIONER-APPELLANT GRASS LAKE IMPROVEMENT BOARD'S APPLICATION FOR LEAVE TO APPEAL

DOUGLAS R. KELLY (P49856)
CLARK HILL PLC
212 East Grand River Avenue
Lansing, MI 48906
(517) 318-3100
dkelly@clarkhill.com
Co-Counsel for Petitioner-Appellant
Grass Lake Improvement Board

CHARLES E. DUNN (P54791)
CHARLES E. DUNN, PLC
5472 Bristol Parke Dr.
Clarkston, MI 48348
(248) 807-6284
CharlesEDunnPLC@comcast.net
Co-Counsel for Petitioner-Appellant
Grass Lake Improvement Board

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT IDENTIFYING THE ORDER APPEALED FROM AND THE RELIEF SOUGHT AND GROUND FOR GRANTING THE APPLICATION

Petitioner-Appellant Grass Lake Improvement Board appeals from the July 21, 2016 opinion of the Court of Appeals (1) reversing the Circuit Court's order awarding attorney fees to the Petitioner-Appellant (**Exhibit A**, Court of Appeals Opinion): *Grass Lake Improvement Bd v Dep't of Envtl Quality*, ___ Mich App ___, 2016 Mich App LEXIS 1396 (July 21, 2016).

Petitioner-Appellant respectfully requests that this Court grant leave to appeal, reverse the Court of Appeals and permit the Circuit Court's order awarding attorney fees to stand. Petitioner-Appellant's Application satisfies the grounds set forth in MCR 7.305(B)(2) because there is an issue of significant public interest in ensuring Michigan agencies follow their own duly promulgated rules. In addition, Petitioner Appellant's Application satisfies the grounds set forth in MCR 7.305(B)(5)(a) and (b) because the Court of Appeals' decision is clearly erroneous and conflicts with over 30 years of well-established case law.

STATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals' published decision is clearly erroneous and will cause a material injustice because the MDEQ's position that it was not required to follow its own duly promulgated rule was always devoid of arguable legal merit where no conflict or tension in the law exists between Mich Admin Code R 281.811(1)(e) and MCL 324.30101, which can be read in harmony and given their plain meaning, and, therefore, the Court of Appeals should have affirmed the decision of the Ingham County Circuit Court that Grass Lake Improvement Board is entitled to recover its wrongfully incurred attorney fees?

Petitioner-Appellant's Answer:	Yes
Respondent-Appellee's Answer:	No
The Circuit Court would answer:	Yes
The Court of Appeals would answer:	No
This Court should answer:	Yes

2. Whether under MCR 7.305(B)(5)(b) the Court of Appeals published decision can be interpreted as contrary to over 30 years of well-established case law because the Court of Appeals wrongly held the MDEQ position that it need not follow its own duly promulgated rules where it can unilaterally claim that it need not follow its rules because of a claimed conflict between the rule and statute?

Petitioner-Appellant's Answer:	Yes
Respondent-Appellee's Answer:	No
The Circuit Court would answer:	Yes
The Court of Appeals would answer:	No
This Court should answer:	Yes

STATEMENT OF BASIS OF JURISDICTION

On July 19, 2016, the Court of Appeals issued its opinion and judgment reversing the Ingham County Circuit Court and reinstating the opinion of the Administrative Law Judge. On July 21, 2016, the Court of Appeals issued an Order vacating the July 19, 2016 opinion and judgment. Also on July 21, 2016, the Court of Appeals issued a revised opinion and judgment reversing the Ingham County Circuit Court and reinstating the opinion of the Administrative Law Judge. In accordance with MCR 7.305(C)(2)(a), an application for leave to appeal filed on or before September 1, 2016 will be timely filed and this Court's jurisdiction will be proper pursuant to MCR 7.303(B)(1).

INTRODUCTION

This matter arises out of an underlying contested case brought in the Michigan Administrative Hearing System by the Grass Lake Improvement Board ("GLIB") after the Michigan Department of Environmental Quality ("MDEQ") denied GLIB's application for a lake augmentation permit. The MDEQ Director ultimately determined that GLIB was entitled to the permit in the very form in which the application for the permit was submitted several years earlier.

The crux of this Application for Leave to Appeal involves the GLIB's attempt to properly recoup its attorney fees under MCL 24.323(1) for the wrongful denial of the permit. GLIB is entitled to its attorney fees, which were substantial, because the MDEQ's position in this case was, at all times, devoid of arguable legal merit.

The case law is clear – administrative agencies must follow their own duly promulgated rules. The MDEQ's own Rule, Mich Admin Code R 281.811(1)(e), always allowed for the issuance of the permit. Both the Director of the MDEQ and the Ingham County Circuit Court agreed with GLIB and recognized that the MDEQ was aware of the requirement that it must follow its rules due to the position taken by the MDEQ in another case. Accordingly, the Ingham County Circuit Court found that the MDEQ's defense in the underlying case was devoid of arguable legal merit.

The Court of Appeals' decision to reverse the Circuit Court is reversible error. There will be a material injustice to GLIB should the Court of Appeals decision be allowed to stand. Further, there will be substantial confusion to the public as to whether the MDEQ is required to follow its rules, there will be a chilling effect on meritorious challenges where MDEQ's fails to lawfully follow its rules and the Court of Appeals decision is contrary to existing law.

The Court of Appeals appropriately cited to long-standing case law and stated "it is equally well-settled . . . that agencies are bound to follow their own duly promulgated rules. Once promulgated, the rules made by an agency to govern its activity cannot be violated or waived by the agency that issued the rules. An administrative agency, in addition to following constitutional and statutory mandates, must also comply with its own rules." **Exhibit A** at 13.

However, the Court of Appeals wrongly stated that there was "tension" between the more than 30 years of case law establishing that agencies must follow their rules and the notion that where a statute and rule conflict, the statute controls. **Exhibit A** at 12. The problem with this finding is that the Court of Appeals failed to demonstrate why it found a conflict between the rule and the statute. That is because the rule and statute can, and should, be read in harmony and given their plain meaning. The rule simply provided definitions for what "enlargement" of a lake means and is such cases is a regulated activity. The statute makes no attempt to provide such a definition. Had the statute and the rule contained contrary definitions, then an actual conflict might exist. That is not the case in this matter. Instead, the MDEQ defined enlargement which did not include the activity conducted by GLIB. There simply is no conflict between the Rule and statute.

Moreover, even if the Rule and statute conflicted, the cases cited by the Court of Appeals simply do not stand for the proposition that an agency may ignore its own duly promulgated rule. If anything, the cited cases support the idea that agencies must follow their duly promulgated rules. Finally, as described by the Director of the MDEQ, the MDEQ was aware at all times that if it did not want to follow its rules, it was required to change them. Accordingly, the MDEQ's assertion that it did not need to follow its Rule is devoid of arguable legal merit.

As a matter of policy and public interest, it is a necessity that agencies under all circumstances and at all times follow the rules and procedures which they have promulgated so that the public can rely on the process that is promised. This Court should accept this application for leave, reverse the decision of the Court of Appeals and uphold the determination of the Ingham County Circuit Court.

CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

1. The Underlying MAHS Contested Case

The Underlying Michigan Administrative Hearing Contested Case (the "MAHS Case") involved an application submitted by GLIB seeking regulatory permission under Part 301 of Michigan Natural Resources and Environmental Act, as amended, being MCL 324.30101, *et seq.* ("NREPA"), related to its installation of an augmentation well for the purpose of raising the water level of Grass Lake in Oakland County, Michigan. In the early stages of the MAHS Case, the GLIB and MDEQ stipulated to hold the case in abeyance while GLIB pursued an action in the Oakland County Circuit Court.

Following numerous proceedings in the Oakland County Circuit Court, including the denial of GLIB's Motion for Summary Disposition, and ultimately a two-day trial, the Court found that it did not have jurisdiction to decide the matter. GLIB appealed to the Michigan Court of Appeals which upheld the Circuit Court's decision. Subsequently, GLIB moved forward in the MAHS Case by filing its Request to Lift Case Abeyance and for Scheduling Filing of Motions.

On April 4, 2012, GLIB filed its Motion for Summary Disposition (similar to that filed in the Circuit Court). On July 31, 2012, the ALJ issued an Opinion and Order granting GLIB's Motion concluding that as a matter of law finding that the MDEQ did not have jurisdiction over GLIB's proposed activity. The basis for the ruling was that there was no activity proposed to occur on the bottomland of Grass Lake as expressly required by the definition of "enlarge" found in Mich Admin Code Rule 281.811(1)(e).

On August 6, 2012, the MDEQ filed a Motion to Treat the July 31, 2012 Opinion and Order as a Proposal for Decision ("PFD") and allowed the filing of Exceptions. That motion

was granted by Order issued on August 23, 2012. Both parties filed Exceptions to the PFD and the Director issued a Final Order on October 11, 2012 that remanded the case to the ALJ to develop a factual record.

GLIB then filed the its Motion for Reconsideration arguing that there are no material facts at issue to be decided through conducting an evidentiary hearing. The MDEQ *for the first time since the inception of this matter*, including the proceedings at Oakland County Circuit Court, agreed with GLIB that there are no material facts at issue to decide whether GLIB's augmentation project is regulated. **Exhibit B** at 2 – MDEQ Brief in Response to GLIB's Motion for Reconsideration and/or Clarification.

On May 1, 2013, the MDEQ Director issued its Final Order on GLIB's Motion for Reconsideration. **Exhibit C**. The Director's order granted GLIB's Motion in its entirety concluded the following as a matter of law: (1) Rule 281.811(e) was properly promulgated and is binding, (2) Because the GLIB proposes no activity on bottomland of Grass Lake and its proposed augmentation project of simply adding water to the lake *is not* regulated under Part 301, and (3) The MDEQ's Guidance Document on water augmentation projects is without legal effect. **Exhibit C**, p. 6.[1]

Incredibly, the MDEQ attempted to issue a permit to GLIB on its own accord (not as a result of any agreement by GLIB) exactly one day ***prior*** to the Director's issuance of its Final Order on Motion for Consideration which wholly rejected MDEQ's position; after almost 5 years of litigation, and after incurring excessive costs, following MDEQ's illegal denial of GLIB's 2009 permit application. The MDEQ permit did not satisfy GLIB's permit application and never became final. Following several rounds of motions, the MDEQ finally issued a Permit in the

[1] The MDEQ admitted that it recently rescinded the Administrative Rule.

form in which GLIB originally applied. On July 17, 2013, the ALJ granted GLIB's Motion for Summary Disposition dismissing GLIB's contested case and holding that GLIB had obtained the relief it sought in filing its contested case in 2009. **Exhibit D** - MAHS Order dated July 17, 2013.

2. GLIB's Petition for Attorney Fees in the MAHS Underlying Contested Case

In light of Director Wyant's Final Order and MDEQ's egregious conduct in reliance on a clearly illegal guidance document, on August 5, 2013, GLIB petitioned for the recovery of its attorney fees and costs pursuant to MCL 24.323. MCL 24.323 provides that the presiding officer that conducts a contested case shall award to a prevailing party, other than an agency, the costs and fees incurred by the party in connection with that contested case, if the presiding officer finds that the position of the agency to the proceeding was frivolous.[2] GLIB contended, in part, that the agency's legal position was devoid of arguable legal merit from the onset as contemplated under MCL 24.323 (1)(c).

On June 23, 2014, the ALJ denied GLIB's Motion for Summary Disposition as to Attorney Fees and Costs Under MCL 24.323 and granted the MDEQ's Motion for Summary Disposition. **Exhibit E**. In rejecting GLIB's contention that the agency's legal position was devoid of legal merit, ALJ Pulter's entire conclusory and unsupported analysis was simply that he thought the case was complex, and thus, MDEQ arguments as to jurisdiction could not be devoid of arguable legal merit. Specifically, the ALJ stated:

> Entitlement to relief under § 123(1)(c) may also be summarily eliminated based on the Petitioner's argument, that "[t]his case is one that has numerous complex legal and technical issues." In reviewing the proceedings and pleadings in this case, the Petitioner's characterization of the "numerous complex legal ... issues,"

[2] This reviewing court should note that Petitioner is given to understand that ALJ Pulter was hired by the State of Michigan in or about June 2014. Pulter was not the presiding ALJ and his Order and Opinion may have been his first opinion at the Department.

> is accurate. Given this, the [MDEQ]'s positions cannot be deemed to be devoid of arguable legal merit under MCL 24.323 (1)(c). [Citations Omitted].

Exhibit E at 3 – 4. GLIB filed its Motion for Reconsideration to the aforementioned order on July 11, 2014 that was rejected in the ALJ's Order dated July 23, 2014. **Exhibit F**.

3. GLIB's Appeal to the Ingham County Circuit Court

Pursuant to MCL 24.301, GLIB appealed the ALJ's Orders of June 23, 2014 and July 23, 2014 arguing that MDEQ's legal position in the MAHS Case was devoid of legal merit, frivolous and should be reversed. MDEQ argued to the contrary and further argued that even if the MDEQ's position was frivolous, the Administrative Procedures Act limits attorney fees to a rate of $75/hour absent special circumstances which it alleged did not exist. On March 3, 2015, the Ingham County Circuit Court issued an Order reversing the ALJ, granting GLIB its costs and attorney fees and further ordered that "special circumstances" existed that would allow GLIB to recover attorney fees at standard rates. See **Exhibit G**.

In the Ingham County Circuit Court, the court reviewed GLIB's appeal of right of a Final Decision of the MDEQ in the form of an Opinion and Order related to GLIB's request for costs and attorney fees under MCL 24.323. In the Opinion and Order dated June 23, 2014, the ALJ denied GLIB's Motion for Summary Disposition as to Attorney Fees and Costs and granted the MDEQ's Motion for Summary Disposition.[3]

The Circuit Court reversed the ALJ and awarded GLIB its attorney fees and costs and determined the MDEQ's position in the case to be frivolous. **Exhibit G** at 4. The Circuit Court relied primarily upon Respondent-Appellant MDEQ Director Daniel Wyant's own statements in his Final Order on Motion for Reconsideration dated May 1, 2014 ("Director's Order") which

[3] Petitioner also appealed in the Circuit Court ALJ Pulter's Opinion and Order dated July 23, 2014 addressing Petitioner's Motion for Reconsideration and/or Clarification on July 21, 2014.

struck down his own agencies' guidance document as being illegal. **Exhibit C** – Director's Order, pp. 3 - 6. It was MDEQ's use of an unpromulgated and nonbinding guidance document as a basis for denying GLIB's permit application that caused GLIB to unnecessarily incur the fees that are the subject of this appeal.

With respect to the basis for reversing the ALJ, the Circuit Court stated:

> The Petitioner argues, and this Court agrees, that this determination fails as a reasoned determination by an administrative agency. The ALJ failed to make any conclusions of fact or law. The ALJ failed to point out any particulars within the record to support such a conclusion. *He cited no legal authority and provided no reasoning whatsoever in support of his conclusion.* This is the very definition of arbitrary and capricious: unreasoned, without reference to guiding principles or consideration, and a decisive exercise of will or caprice. (Emphasis added).

Exhibit G – Circuit Court Order dated March 3, 2015.

The Circuit Court also expressly rejected MDEQ's argument to limit the fees to $75/hour holding that "special circumstances" indeed existed as defined by the applicable statute. This determination allowed GLIB to recover its attorney fees at the rate at which it pays, rather than a rate entirely favorable to MDEQ. However, the Ingham County Circuit Court did not allow GLIB to recover its attorney fees incurred in a related Oakland County Circuit Court matter and the subsequent appeal. GLIB contends that the Oakland County Circuit Court case was sufficiently related to the contested case to allow for the award of attorney fees in favor of GLIB.

The MDEQ filed an application for leave to appeal to the Michigan Court of Appeals.. The application was granted and on July 21, 2016 the Court of Appeals issued an opinion reversing the Ingham County Circuit Court.

STANDARD OF REVIEW

A tribunal's interpretation of a statute is subject to review de novo. *In re Complaint of Rovas*, 482 Mich 90, 102; 754 NW2d 259 (2008). Likewise a tribunal's interpretation of an administrative rule. *Aaronson v Lindsay & Hauer Int'l Ltd*, 235 Mich App 259, 270; 597 NW2d 227 (1999). A tribunal's evidentiary decisions are reviewed for an abuse of discretion. *See, Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993); *National Wildlife Federation v Department of Environmental Quality,* 306 Mich App at 373, 372-373; 856 NW2d 394 (2014).

The circuit court's task was to review the administrative decision to determine if it was authorized by law and supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; MCL 24.306(1). An agency decision is not authorized by law if it violates constitutional or statutory provisions, lies beyond the agency's jurisdiction, follows from unlawful procedures resulting in material prejudice, or is arbitrary and capricious. *Northwestern Nat'l Cas Co v Comm'r of Ins*, 231 Mich App 483, 488; 586 NW2d 563 (1998). *National Wildlife Federation v. Department of Environmental Quality*, *supra.*

"[W]hen reviewing a lower court's review of agency action, this Court must determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Boyd v Civil Serv Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). "This latter standard is indistinguishable from the clearly erroneous standard . . . . [A] finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made." *Id* at 234-235. *National Wildlife Federation v Department of Environmental Qualify, supra.*

ARGUMENT

I. The Court of Appeals' Published Decision Is Clearly Erroneous and Will Cause a Material Injustice Because the MDEQ's Position that It Was Not Required to Follow Its Own Duly Promulgated Rule Was Always Devoid of Arguable Legal Merit Where No Conflict or Tension in the Law Existed Between Mich Admin Code R 281.811(1)(e) and MCL 324.30102(1), Which Can Be Read in Harmony and Given Their Plain Meaning, and Therefore the Court of Appeals Should Have Affirmed the Decision of the Ingham County Circuit Court that Grass Lake Improvement Board Is Entitled to Recover Its Wrongfully Incurred Attorney Fees.

A. The Circuit Court Properly Determined that the MDEQ's Position Was Devoid of Arguable Legal Merit Under MCLA 24.323(1)(c).

The Circuit Court properly determined that the ALJ erred in denying GLIB's Motion for Summary Disposition as to Attorney Fees and Costs Under MCL 24.323 ("GLIB's Motion") and in granting MDEQ's Motion for Summary Disposition ("MDEQ's Motion"). As to both the former and latter, the Circuit Court held that the ALJ failed to address in any meaningful way whatsoever GLIB's well-supported arguments that the MDEQ's position throughout the underlying case was frivolous and devoid of arguable legal merit. MCL 24.323 (1)(c). **Exhibit G.**

MCL 24.323 provides the conditions (only one of which must be met) for the agency's position to be deemed frivolous.

MCL 24.323 (1) provides the following:

> (a) the agency's primary purpose in initiating the action was to harass, embarrass, or injure the prevailing party;
> (b) the agency had no reasonable basis to believe that the facts underlying its legal position were, in fact, true.
> (c) the agency's legal position was devoid of arguable legal merit.

MCL 24.323(2) provides that the party seeking costs presenting evidence establishing all of the following:

> (a) That the position of the agency was frivolous.
> (b) That the party is a prevailing party.

(c) The amount of costs and fees sought including an itemized statement, from any attorney, agent, or expert witness who represented the party showing the rate at which the costs and fees were computed.
(d) That the party is eligible to receive an award under this section.
(e) That a final order not subject to further appeal other than for the judicial review of costs and fees provided for in section 125 has been entered in the contested case regarding the subject matter of the contested case.

In addressing whether MDEQ's position was devoid of arguable legal merit, the ALJ merely concluded that he thought the case was complex based on his review, and thus, MDEQ arguments as to jurisdiction could not be devoid of arguable legal merit. Specifically, the ALJ stated:

> Entitlement to relief under § 123(1)(c) may also be summarily eliminated based on the Petitioner's argument, that "[t]his case is one that has numerous complex legal and technical issues." In reviewing the proceedings and pleadings in this case, the Petitioner's characterization of the "numerous complex legal ... issues," is accurate. Given this, the [MDEQ]'s positions cannot be deemed to be devoid of arguable legal merit under MCL 24.323(1)(c). [Citations Omitted].

Exhibit D, pp. 3 – 4.

In no way should these three sentences be endorsed as a reasoned final decision from a state administrative agency. The Circuit Court recognized this in its opinion reversing the ALJ. **Exhibit G**, p. 3. As the Circuit Court explained, the ALJ failed to make any findings of fact and/or legally supported conclusions of law in rejecting GLIB's well-supported motion as required under the Administrative Procedures Act. Secondly, the ALJ neither described which proceedings and/or pleadings that had arguable legal merit nor did the ALJ make any attempt to analyze or dispute the findings and conclusions in the Proposal for Decision or in the Director's Final Order. Finally, the ALJ did not provide any reasoning or legal authority to support a conclusion that MDEQ's position asserting jurisdiction over the project had any legal merit whatsoever – because such reasoning or legal authority simply does not exist.

Another error by the Court of Appeals is that it clearly applied an subjective standard to whether a claim more or defense is frivolous. However, the law is clear – the proper inquiry is determined by an objective standard. See e.g. *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NWd 310 (2003). (Whether a claim is frivolous must be determined based on the circumstances that existed at the time the claim was asserted. Under statute and court rule, again, an attorney and the represented party have an affirmative duty to conduct a reasonable inquiry into the factual and legal viability of the alleged claim before signing any document). See also *Attorney General v Harkins*, 257 Mich App 564, 576; 669 NW2d 296 (2003) (Whether the inquiry was reasonable is determined by an objective standard).

Here, under an objective standard, the Rule could and should have been applied as written. Any subjective belief by MDEQ staff is irrelevant to the inquiry.

B. The Court of Appeals Decision Is Clearly Erroneous and Will Cause a Material Injustice Because There Simply Is No "Tension" Between (1) the Established Case Law that Clearly Provides that an Agency Must Comply with Its Own Rules and (2) the Case Law that Holds that Courts Must Follow Statutory Law Over Agency Rules.

The Court of Appeals suggested that there was "tension between the precedents as they apply to the present case." **Exhibit A** at 13. However, no such tension exists because (1) the MDEQ always knew that its position was without support due to its taking the opposite position in another matter, and (2) the Rule 281.811(1)(e) and MCL 324.30102 do not conflict and may be read in harmony and given their plain meaning.

To understand and appreciate the frivolous position taken by the MDEQ, some background regarding the history of this matter is required. MDEQ Director Wyant granted GLIB relief in the underlying matter by striking down MDEQ's actions and finding that its 2006 Guidance Document on Water Augmentation Projects was without legal effect. The MDEQ knew its Guidance was

illegal since the effect of it was to effectively amend an unambiguous Rule, another position in direct opposition to clear Michigan law that a rule can only be amended by a rule. Accordingly, as to the Part 301 issues, and any other alleged remaining issues (when considering the MDEQ's action of capitulating following the Director's Order on Reconsideration), it is undisputed that the Agency's legal position was devoid of arguable legal merit and was thus frivolous as a matter of law.

The MDEQ also filed its own Motion for Summary Disposition where it clung to its position that somehow denying the permit application had arguable legal merit, even though it did not prevail on the primary legal issue in the case. Simply put, the MDEQ had no authority under any statute to simply ignore a properly promulgated rule. *Micu v City of Warren,* 147 Mich App 573, 584; 382 NW2d 823, 828 (1985) **This is worth repeating: the MDEQ had no authority under any statute to simply ignore a duly promulgated rule. And they knew that to be the case as described in Director Wyant's Final Order.** A large and powerful agency such as the MDEQ is keenly aware of its own inherent and statutory authority, as well as its limitations, and should be charged with such knowledge of the statutes it implements.

Moreover, what made MDEQ's behavior so appalling and egregious is the fact that it acknowledged that it needed to modify the exact same rule in its Amicus Brief filed in *Michigan Citizens for Water Conservation v. Nestle Waters N. Am., Inc.*, Court of Appeals docket # 254202 (**Exhibit H** at 13-14; 17-18). This is an express admission that MDEQ knew that it did not have the authority to act as it did as identified by Director Wyant. As pointed out by Director Wyant, "[i]t is totally inconsistent for the [MDEQ] to acknowledge it needs to modify the rule, and then decide to ignore it before a modification is made." **Exhibit C** at 5. There is no tension – simply a frivolous legal argument.

The Director's Order points out that the MDEQ was well aware of Rule 281.811 (e) and its proper application prior to 2003. Further, MDEQ's claims it made efforts to change the rule when it apparently did not regulate in the manner that it then wished. The Director's Order states:

> The [MDEQ] and all of its predecessors applied Rule 281.811 (e) from the beginning of regulation under the Inland Lakes and Streams Act until the Circuit Court ruled in the *Nestle Waters* case in 2003. In *Nestle Waters* the Court pointed out that the Rule was more restrictive than the Statute. Kim Fish testified at the Oakland Circuit Court trial in this matter that the Department has worked for years to change the rule, but such changes can take a very long time due to debate amongst the relevant stakeholders as to what should be changed, how it should be changed, etc. . . . Since 2003 the [MDEQ] has been applying the statute to regulate such activities and ignoring its rule. In 2006 it issued the "Guidance Document" so that these activities would be regulated consistently state-wide.

Exhibit C at 3.

Additionally, the Director rejected the MDEQ's straw man "conflict" argument as a basis to simply ignore its own rules stating the following:

> The [MDEQ] is correct in that Michigan law is overwhelmingly clear that administrative rules must comply with the statute and, when a statute and a rule conflict, the statute controls. However, this conclusion does not provide the [MDEQ] with a basis to simply ignore its own rule. First, it is the circuit courts of this State that have the authority to determine the validity or invalidity of rules. *Dykstra, supra.*[4] It is not within the Department's authority under the circumstances of this case to make that determination and then unilaterally and informally take a course of action contrary to the Rule. It is totally inconsistent for the [MDEQ] to acknowledge it needs to modify the rule, and then decide to ignore it before a modification is made.
>
> More specific and correctly stated . . . a major and overriding tenant of administrative law is that an agency is bound by its administrative rules.
>
> Michigan case law has also made it clear that departments must follow their own administrative rules once properly promulgated. Particularly pertinent to the instant case is the holding in *Micu* v. *City of Warren.* In that case, the Michigan Court of Appeals found that "once promulgated, the rules made by an agency to govern its activity cannot be violated or waived by the agency that issued the rules," and for an

[4] *Dykstra v. Department of Natural Resources*, 198 Mich App 482, 499 NW2d 367 (1993).

> agency to act contrary to the rule, it must be changed. *Micu* v. *City of Warren,* (citing *De Beaussaert v. Shelby Twp.,* 122 Mich App 128, 129, 333 NW2d 22 (1982)). Even if the rule is inconsistent with the statute, an agency must change its rule before acting counter to it. Therefore, even though the current administrative rule narrowly defines the term enlargement when the plain text of the statute is broad, the inconsistency does not serve as a legitimate basis to bypass Rule 281.811 (e). PFD, p. 10

Exhibit C at 5 and 10. [5]

The MDEQ Director stated it best. It is a "major and overriding tenant of administrative law that an agency is bound by its administrative rules."

The Court of Appeals opinion mistakenly took a direction that it need not have – that is, that somehow it needed to resolve a "tension" between the Part 301 and the Rule where no tension existed. Part 301 provides in relevant part: "Except as provided in this part, a person without a permit from the department shall not do any of the following. . . . [c]reate, enlarge, or diminish an inland lake or stream."

Part 301 of the NREPA does not define the term "enlarge," but, at the time DEQ denied the GLIB's application, the Rule 281.811(1)(e) provided the following definition:

> enlarge or diminish an inland lake or stream" means the dredging or filling of bottomlands, or the dredging of adjacent shorelands, to increase or decrease a body of water's surface area or storage capacity or the placement of fill or structures, or the manipulation, operation, or removal of fill or structures, to increase or decrease water levels in a lake, stream, or impoundment.

These provisions can be read together and provided their plain meaning and no analysis of a conflict of law doctrine need be examined. The Rule provides the definition of the term

[5] The Director's statement that it is not within the Department's authority to determine the validity or invalidity of rules is dispositive on MDEQ's straw man arguments (i) that the existence of an alleged conflict can bear on whether an agency has to follow its own rules or (2) the allegation that the agency wanted to change its rule. Both of these allegations in this Application For Leave are irrelevant, and quite frankly, directly contrary to the MDEQ's official position on the matter as set forth in the Director's Order. If the rule is properly promulgated, then the agency must follow it pursuant to the Director's Order. End of Story. It would appear that the agency is estopped from arguing anything different at this point since the agency speaks only through its rules and orders, and not through its attorneys who are apparently now contradicting their own director.

"enlargement" as provided in the statute. There is no dispute between the parties that GLIB's activities did not fall within the definition provided in the Rule. The MDEQ does not point to a different definition in Part 301 or Rule itself. Instead, it relied upon and clung to a definition in a Guidance Document that is not a duly promulgated rule. As written, Part 301 and the Rule may be read in harmony and should have immediately been immediately interpreted to allow for this permit.

Even if there was some tension between Part 301 and the Rule, which there is not, the cases cited by the Court of Appeals either have no applicability to this case or actually support GLIB's position. The Court of Appeals decision provided:

> [I]t has long been recognized by Michigan Courts that, due to the very nature of an administrative agency's rulemaking power, when a statute and an administrative rule conflict, the statute necessarily controls. *See, Rovas,* 482 Mich at 98 ("While administrative agencies have what have been described as 'quasi-legislative' powers, such as rulemaking authority, these agencies cannot exercise legislative power by creating law or changing the laws enacted by the Legislature."); *Mich Sportservice v Nims*, 319 Mich 561, 566; 30 NW2d 281 (1948) ("The provisions of the rule must, of course, be construed in connection with the statute itself. In case of conflict, the latter governs. It is not within the power of the department of revenue to extend the scope of the act."); *Acorn Iron Works v Auditor Gen*, 295 Mich 143, 151; 294 NW 126 (1940) ("The state board of tax administration from time to time has changed its construction and method of enforcing the sales tax law as it affects building trade transactions; but in this connection it is sufficient to note that liability for payment of the sales tax is controlled by statute. It cannot be imposed by rulings or regulations of the board."); *Walgreen Co v Macomb Twp*, 280 Mich App 58, 71; 760 NW2d 594 (2008) ("A rule is invalid when it conflicts with the provisions of the governing statute.").

It is true that where a rule and statute conflict, a court must apply the statute. However, this is a judicial standard – not a standard by which agencies may make decisions on whether or not to apply their rules. It is simply wrong from the start that an agency can exercise judicial powers and apply its own rules an arbitrary and capricious manner. *Micu v. City of Warren*

holds that an agency must follow its rules and, if it does not wish to follow its rules, the agency must change its rules. Such a holding is entirely consistent with the foregoing cases and does not in away way conflict with the idea that where a court is interpreting a truly conflicting rule and statute, the statute applies.

The fact remains that the MDEQ promulgated a Rule defining the enlargement of a lake. If it did wish to follow that Rule, it simply needed to change the Rule. MDEQ acknowledge this fact in its filing in *Nestle Waters, supra.* It cannot be the law that the public is made to guess whether an agency will or will not apply its rule to any particular manner.

II. Under MCR 7.305(B)(5)(b) the Court of Appeals Published Decision will be Interpreted as Contrary to Over 30 years of Well-Established Case Law Because the Court of Appeals Wrongly Held that the MDEQ's Position that it Need not Follow its Own Duly Promulgated Rules Where it can Unilaterally Claim that a Conflict Exists Between a Rule and a Statute.

The Court of Appeals decision should be reversed because it interprets existing law in a manner that will lead to inconsistent results. First, as discussed above, there is no conflict between the rule and the statute. Even if there was, as discussed above, when faced with a actual conflict between a rule and a statute, a *court* must apply the statute. This well-settled principle however does not apply to agency decisions. It is clear that an agency must follow rules.

This is entirely consistent with the holding in *Micu v. City of Warren.* ("Once promulgated, the rules made by an agency to govern its activity cannot be violated or waived by the agency that issued the rules," and for an agency to act contrary to the rule, it must be changed). *Micu v. City of Warren,* (citing *De Beaussaert v. Shelby Twp.,* 122 Mich App 128, 129, 333 NW2d 22 (1982)). Even if the rule is inconsistent with the statute, an agency must change its rule before acting counter to it. See also *Ameira Corp. v. Veneman*, 347 F Supp 2d 225 (MDNC 2004) (It is a necessity that agencies follow the rules and procedures which they have promulgated so that the

public can rely on the process that is promised); *Health Alliance Hosps., Inc. v. Burwell*, 130 F Supp 3d 277 (DC Cir 2015) (finding that the agency's failure to follow its own regulations was arbitrary and capricious).

The Court of Appeals decision for all practical purposes is contrary to this line of cases. The Court of Appeals decision can plainly be read as allowing an agency to choose between its Rule and the general language of statute. Such a result effectively affords unfettered discretion for an agency representative to take actions during the administrative process that are clearly contrary to law. That is a not only contrary to existing law but is not a reliable and bright line standard on which the public can rely.

In addition, the well-established law that is being changes is that it is no longer a requirement that a litigant provide competent legal authority in support of its claim or defense to avoid its position being deemed "frivolous". Arguing that "tension" exists between a statute and a rule does not relieve the agency from the requirement of following a duly promulgated rule. The "law" cited by MDEQ never provided any legal basis whatsoever to deny the permit. The Court of Appeals decisions has interjected a "subjective" standard into the frivolous analysis as to what the MDEQ was thinking – which is irrelevant. The analysis by the court must be purely objective. In other words, if the cases do not provide a basis for ruling in favor of a litigant, the litigant's position is frivolous.

For these reasons, the Court of Appeals decision should be reversed.

CONCLUSION AND REQUESTED RELIEF

The MDEQ's legal position in the MAHS Case was frivolous because Michigan law does not give administrative agencies within the agency process the authority to make determinations

of the validity or invalidity of its rules, and then unilaterally and informally take a course of action contrary to the rule, which is what the MDEQ did in this case. MDEQ's own Director, Daniel Wyant, concluded that the MDEQ had "no basis" to simply ignore its own rule in the face of an "overriding tenant of administrative law" that an agency is bound by its administrative rules. The Circuit Court properly found that the MDEQ position had no arguable legal merit.

Furthermore, the Court of Appeals decision cannot stand because it is essentially contrary to over 30 years of well-established case law.

Therefore, Grass Lake Improvement Board respectfully requests that this Court grant the application for leave appeal, peremptorily reverse the decision of the Court of Appeals and remand the case to the Court of Appeals for entry of judgment reinstating the decision of the Ingham County Circuit Court.

Respectfully submitted,

CLARK HILL PLC

By: /s/ Douglas R. Kelly

Douglas R. Kelly (P49856)
Clark Hill PLC
212 E. Grand River Avenue
Lansing, Michigan 48906
(517) 318-3100
Attorneys for Petitioner-Appellant Grass Lake Improvement Board

Dated: September 1, 2016

CERTIFICATE OF SERVICE

I state that on September 1, 2016, the foregoing Petitioner-Appellant Grass Lake Improvement Board's Application for Leave to Appeal, was filed with the Court via the ECF system, and served upon all attorneys of record via United States Mail and electronic mail.

By: /s/ Douglas R. Kelly
Douglas R. Kelly (P49856)
Clark Hill PLC
212 E. Grand River Avenue
Lansing, Michigan 48906
(517) 318-3100
Attorneys for Petitioner-Appellant Grass Lake Improvement Board

EXHIBIT LIST

A. *Grass Lake Improvement Bd v Dep't of Envtl Quality*, ___ Mich App ___, 2016 Mich App LEXIS 1396 (July 21, 2016)

B. MDEQ Brief in Response to GLIB's Motion for Reconsideration and/or Clarification

C. May 1, 2013, Director Wyant Final Order on Motion for Reconsideration

D. July 17, 2013, MAHS Opinion and Order

E. June 23, 2014, MAHS Opinion and Order

F. July 23, 2014, MAHS Opinion and Order

G. March 3, 2015, Ingham County Circuit Court Opinion and Order

H. June 20, 2011, Brief of Amicus Curiae Michigan Department of Environmental Quality, Michigan Court of Appeals, Case No. 254202

EXHIBIT A

GRASS LAKE IMPROVEMENT BOARD, Petitioner-Appellee/Cross-Appellant, v DEPARTMENT OF ENVIRONMENTAL QUALITY, Respondent-Appellant/Cross-Appellee.

No. 326571

COURT OF APPEALS OF MICHIGAN

2016 Mich. App. LEXIS 1396

July 21, 2016, Decided

NOTICE:

THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE MICHIGAN COURT OF APPEALS REPORTS.

PRIOR HISTORY: [*1] Ingham Circuit Court. LC No. 2014-001064-AA.
Grass Lake Improvement Bd. v. Dep't of Envtl. Quality, 2016 Mich. App. LEXIS 1373 (Mich. Ct. App., July 19, 2016)

CASE SUMMARY:

OVERVIEW: HOLDINGS: [1]-In awarding attorney fees to petitioner under *MCL 24.323(1)(c)* on the ground that the agency's legal position in the original contested case was frivolous, the trial court applied an incorrect legal standard in that the question was not whether the agency's position had legal merit, but was devoid of arguable legal merit; [2]-The agency's legal position here was sufficiently grounded in law as to have at least some arguable legal merit, and hence it was not "frivolous" under *MCL 24.323(1)(c)*.

OUTCOME: Trial court's decision reversed and ALJ's decision reinstated.

CORE TERMS: contested case, lake, legal position, frivolous, arguable, devoid, administrative rules, administrative agencies, enlarge, attorney fees, presiding officer, prevailing party, augmentation, enlargement, promulgated, stakeholder, stream, water level, quotation marks, cross-appeals, bottomlands, rulemaking, awarding, grounded, prevail, case law, proposed activity, following conditions, surface area, plain meaning

COUNSEL: For **GRASS LAKE IMPROVEMENT BOARD,** Petitioner-Appellee-Cross Appellant: KELLY DOUGLAS R, BIRMINGHAM, MI.

For ENVIRONMENTAL QUALITY DEPARTMENT OF, Respondent-Appellant-Cross Appellee: BOCK DANIEL P, LANSING, MI.

JUDGES: Before: Wilder, P.J., and Murphy and O'Connell, JJ.

OPINION BY: Kurtis T. Wilder

OPINION

WILDER, P.J.

In these cross-appeals arising out of a contested administrative proceeding, the parties appeal from the circuit court's order reversing the decision of an administrative law judge (ALJ) and awarding attorney fees to petitioner, **Grass Lake Improvement Board** (the Board). We reverse the circuit court and reinstate the decision of the ALJ.

I. FACTUAL BACKGROUND

The attorney fees at issue were incurred in a previous contested case under the administrative procedures act of 1969 (APA), *MCL 24.201 et seq.*, which was initiated by the Board against respondent, Department of Environmental Quality (DEQ). The dispute between the

A

parties arose after the Board filed an application seeking a permit to use an "augmentation well" to pump water into Grass Lake and thereby increase its water level. In June 2009, DEQ denied the Board's application. In response, the Board filed a petition seeking [*2] review of DEQ's decision in a contested cas.

The pivotal issue in the contested case was whether the Board's proposed augmentation well would "enlarge" Grass Lake as that term is used in Part 301 of the Natural Resources and Environmental Protection Act (NREPA), *MCL 324.30101 et seq.*, specifically in *MCL 324.30102(1)* ("Except as provided in this part, a person without a permit from the department shall not do any of the following. . . . Create, *enlarge*, or diminish an inland lake or stream.") (emphasis added). Part 301 of the NREPA does not define the term "enlarge," but, at the time DEQ denied the Board's application, the Michigan Administrative Code provided[1] a definition at *Mich Admin Code, R 281.811(1)(e)*:

> "enlarge or diminish an inland lake or stream" means the dredging or filling of bottomlands, or the dredging of adjacent shorelands, to increase or decrease a body of water's surface area or storage capacity or the placement of fill or structures, or the manipulation, operation, or removal of fill or structures, to increase or decrease water levels in a lake, stream, or impoundment.

The Board argued that, under the above definition of "enlarge," its proposed activity of raising the water level by constructing an augmentation well did not constitute [*3] an enlargement of Grass Lake. Thus, the Board argued, DEQ's denial of the Board's application was improper under the department's own administrative rules.

> 1 *Mich Admin Code, R 281.811* has since been amended to remove the definition at issue here. 2015 Mich Reg 5, p 75 (April 1, 2015).

DEQ responded that, as interpreted by both DEQ and an advisory opinion of our Attorney General's office, "the plain language of the statute [*MCL 324.30102(1)*] . . . clearly includes adding water to a lake to increase its volume and surface area[.]" DEQ acknowledged that the above interpretation of *MCL 324.30102(1)* was contrary to *Mich Admin Code, R 281.811(1)(e)*. Nevertheless, citing the well-settled principle that "when a statute and an administrative rule conflict, the statute controls," DEQ argued that, to the extent its administrative rule conflicted with the plain meaning of *MCL 324.30102(1)*, DEQ was required to follow the statute and ignore the rule.

In reply, the Board argued that, under established Michigan law, administrative agencies, such as DEQ, have a duty to follow their own duly promulgated administrative rules. Citing in support *Micu v City of Warren, 147 Mich App 573; 382 NW2d 823 (1985)*, the Board further argued that DEQ's duty to follow *Rule 281.811(1)(e)* extended even to a situation, such as this, where DEQ believed the rule was contrary to the plain meaning of a statute. [*4]

After considering the matter, the ALJ decided in the Board's favor, reasoning as follows:

> [DEQ] contends that it "has worked for years to change the existing administrative rule [*Rule 281.811(1)(e)*], but such changes can take a very long time due to debate amongst the relevant stakeholders as to what should be changed, and how it should be changed, etc." By making this statement, [DEQ] is acknowledging the very reason why it must follow its administrative rules. When [DEQ] is able to ignore its own administrative rule, it is able to create and enforce policy without considering the input and interests of relevant stakeholders. Reconciling stakeholder interests is an important part of the rule-making process. Allowing [DEQ] to circumvent its rules through an alternate interpretation bypasses the steps which were created in the APA to account for and protect relevant stakeholders and public interests. The statutory language taken on its own seems broad enough to include the [Board]'s proposed activity (i.e. lake enlargement). However, the rule defining the term "enlargement" clearly limits the [DEQ]'s jurisdiction to activities taking place on bottomlands. Based upon the application of the Rule . . . and [*5] other documentary evidence submitted, the proposed lake augmentation project does not implicate Part 301 jurisdiction.
>
> I conclude as a matter of law that the proposed lake augmentation project, that is the act of adding water to the lake without activity on bottomlands, does not implicate the Department's jurisdiction under Part 301. There is no enlargement of Grass Lake.

Following a motion for reconsideration, the ALJ's opinion and order was adopted by DEQ Director Dan Wyant. Thereafter, the remaining issues were summarily dismissed by stipulation of the parties, the contested case was concluded, and DEQ issued the requested permit to the Board.

Afterwards, the Board initiated a second contested case, in which it sought its attorney fees related to the first contested case. Relevant to this appeal, the Board argued that, under *MCL 24.323(1)*, it was entitled to such fees because DEQ's legal position in the prior contested case was "devoid of arguable legal merit." The ALJ denied the Board's request for attorney fees, deciding that DEQ's legal position had at least *some* arguable legal merit:

> Entitlement to relief under *§ 123(1)(c)* may [] be summarily eliminated based on the [Board]'s argument, that "[t]his case is one [*6] that has numerous complex legal and technical issues." In reviewing the proceedings and pleadings in this case, the [Board]'s characterization of the "numerous complex legal . . . issues," is accurate. Given this, [DEQ]'s positions cannot be deemed to be devoid of arguable legal merit under *MCL 24.323(1)(c)*.

The Board appealed in the circuit court, which reversed the ALJ's fee decision:

> The ALJ below found that [DEQ]'s position was not devoid of arguable legal merit. . . . The [Board] argues, and this [c]ourt agrees, that this determination fails as a reasoned determination by an administrative agency. The ALJ failed to make any conclusions of fact or law. The ALJ failed to point out any particulars within the record to support such a conclusion. He cited no legal authority and provided no reasoning whatsoever in support of his conclusion. This is the very definition of arbitrary and capricious: unreasoned, without reference to guiding principles or considerations, and a decisive exercise of will or caprice.
>
> Furthermore, [the Board] argues that [DEQ]'s position was frivolous by being devoid of legal merit. This [c]ourt agrees. The [DEQ]'s position was that there existed a conflict of law between a statute, Part 301[[*7] of the NREPA], and an administrative rule, [] *Rule 281.811*. The [DEQ] argued that where such conflicts exist, the statute prevails over the rule[.]
>
> * * *
>
> However, [] Director [Wyant] found in his final order that . . . the language of the statute and the language of the Rule were not conflicting per se. The statute at issue does not define what it means to "enlarge" a lake or stream, where that is precisely what the Rule does. The Rule's narrow interpretation of the statue is not a direct conflict.
>
> Furthermore, Michigan case law makes it clear that administrative agencies must follow their own rules once properly promulgated. *MICU[, 147 Mich App at 584]*. . . . Here, not only did [DEQ] knowingly violate its own rule, it apparently did so for years without attempting to re-promulgate [sic] a new rule. Given the overwhelming case law that condemns this exact behavior, it is clear the reliance on a policy that prescribes that behavior is devoid of legal merit, and therefore, the [DEQ]'s position in this case was frivolous. This [c]ourt grants [the Board]'s motion for fees and costs incurred defending its case in the Michigan Administrative Hearing System.

The instant cross-appeals followed.

II. STANDARDS OF REVIEW

We review the [*8] circuit court's decision to determine whether it "applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *City of Sterling Heights v Chrysler Group, LLC, 309 Mich App 676, 681; 873 NW2d 342 (2015)* (quotation marks and citation omitted). We review the circuit court's interpretation and application of statutes de novo. *Glenn v TPI Petroleum, Inc, 305 Mich App 698, 702; 854 NW2d 509 (2014)*. On the other hand, an administrative agency's statutory interpretation is reviewed under the standard first enunciated in *Boyer-Campbell Co v Fry, 271 Mich 282; 260 NW 165 (1935)*:

> [T]he construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. However,

> these are not binding on the courts, and [w]hile not controlling, the practical construction given to doubtful or obscure laws in their administration by public officers and departments with a duty to perform under them is taken note of by the courts as an aiding element to be given weight in construing such laws and is sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature. [*In re Complaint of Rovas, 482 Mich 90, 101, 108; 754 NW2d 259 (2008)* (second alteration in original), quoting *Boyer-Campbell, 271 Mich at 296-297* (quotation marks and citations omitted).]

"Respectful consideration" of an agency's statutory [*9] interpretation is not akin to "deference," at least as that "term is commonly used in appellate decisions" today. *Rovas, 482 Mich at 108*. While an agency's interpretation can be a helpful aid in construing a statutory provision with a "doubtful or obscure" meaning, our courts are responsible for finally deciding whether an agency's interpretation is erroneous under traditional rules of statutory construction. *Id. at 103, 108-109*.

III. ANALYSIS

On appeal, DEQ argues that the circuit court applied incorrect legal principles when it reversed the ALJ's decision. We agree.

In pertinent part, *MCL 24.323* provides:

> (1) The presiding officer that conducts a contested case shall award to a prevailing party, other than an agency, the costs and fees incurred by the party in connection with that contested case, *if the presiding officer finds that the position of the agency to the proceeding was frivolous*. To find that an agency's position was frivolous, the presiding officer shall determine that *at least 1* of the following conditions has been met:
>
> (a) The agency's primary purpose in initiating the action was to harass, embarrass, or injure the prevailing party.
>
> (b) The agency had no reasonable basis to believe that the facts underlying its legal position [*10] were in fact true.
>
> (c) *The agency's legal position was devoid of arguable legal merit.*
>
> (2) If the parties to a contested case do not agree on the awarding of costs and fees under this section, a hearing shall be held if requested by a party, regarding the awarding of costs and fees and the amount thereof. . . . [Emphases added.]

Under *MCL 24.325(1)*, "a party that is dissatisfied with the final action taken by the presiding officer under *section 123* [*MCL 24.323*] in regard to costs and fees may seek judicial review of that action pursuant to chapter 6." The reviewing court "may modify" the presiding officer's "action only if the court finds that the failure to make an award or the making of an award was an abuse of discretion, or that the calculation of the amount of the award was not based on substantial evidence." *MCL 24.325(2)*; *Widdoes v Detroit Pub Sch, 218 Mich App 282, 289; 553 NW2d 688 (1996)*. If the reviewing court "awards costs and fees to a prevailing party upon judicial review of the final action of a presiding officer in a contested case," then the reviewing court "shall award those costs and fees provided for in [*MCL 24.323*], if the court finds that the position of the state involved in the contested case was frivolous." *MCL 600.2421d*; *Widdoes, 218 Mich App at 289*.

The circuit court decided that, under *MCL 24.323(1)(c)*, DEQ's legal position in the original [*11] contested case was frivolous. In reaching that conclusion, the circuit court applied an incorrect legal standard. The circuit court reasoned that, because DEQ's legal position was "devoid of legal merit," it necessarily followed that DEQ's legal "position in this case was frivolous." But whether an argument has "legal merit" is not the proper legal question to be considered by the circuit court. Rather, the standard, as announced by *MCL 24.323(1)(c)*, is whether DEQ's legal position "was devoid of *arguable* legal merit." (Emphasis added.)

There is little authority interpreting the language of *MCL 24.323(1)(c)*. Fortunately, however, there are many cases interpreting the nearly identical language found in *MCL 600.2591(3)(a)*.[2] See, e.g., *Adamo Demolition Co v Dep't of Treasury, 303 Mich App 356, 368; 844 NW2d 143 (2013)*. We find such authority highly persuasive here. "A claim is not frivolous merely because the party advancing the claim does not prevail on it." *Id.* Instead, "a claim is devoid of *arguable* legal merit if it is not suf-

ficiently grounded in law or fact, such as when it violates basic, longstanding, and unmistakably evident precedent." *Id. at 369* (quotation marks, citations, and footnotes omitted; emphasis added).

2 *MCL 600.2591(3)(a)* provides:

> (a) "Frivolous" means that at least 1 of the following conditions is met:
>
> (*i*) The party's primary [*12] purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (*ii*) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (*iii*) party's legal position was devoid of arguable legal merit.

Here, although DEQ did not prevail in the prior contested case, its legal position was sufficiently grounded in law as to have some *arguable* legal merit. There is an undeniable tension between the legal rules cited by the parties in the prior contested case. On one hand, as DEQ argued below, it has long been recognized by Michigan Courts that, due to the very nature of an administrative agency's rulemaking power, when a statute and an administrative rule conflict, the statute necessarily controls. See *Rovas, 482 Mich at 98* ("While administrative agencies have what have been described as 'quasi-legislative' powers, such as rulemaking authority, these agencies cannot exercise legislative power by creating law or changing the laws enacted by the Legislature."); *Mich Sportservice v Nims, 319 Mich 561, 566; 30 NW2d 281 (1948)* ("The provisions of the rule must, of course, be construed in connection with the statute itself. In case of conflict, the latter governs. It is not within [*13] the power of the department of revenue to extend the scope of the act."); *Acorn Iron Works v Auditor Gen, 295 Mich 143, 151; 294 NW 126 (1940)* ("The state board of tax administration from time to time has changed its construction and method of enforcing the sales tax law as it affects building trade transactions; but in this connection it is sufficient to note that liability for payment of the sales tax is controlled by statute. It cannot be imposed by rulings or regulations of the board."); *Walgreen Co v Macomb Twp, 280 Mich App 58, 71; 760 NW2d 594 (2008)* ("A rule is invalid when it conflicts with the provisions of the governing statute.").

On the other hand, it is equally well-settled, as the Board argued below, that agencies are bound to follow their own duly promulgated rules. See *Detroit Base Coalition for Human Rights of Handicapped v Dep't of Social Services, 431 Mich 172, 189; 428 NW2d 335 (1988)* ("An agency is under a duty to follow its own rules."); *Micu, 147 Mich App at 584* ("[O]nce promulgated, the rules made by an agency to govern its activity cannot be violated or waived by the agency that issued the rules."); *Rand v Civil Service Com., 71 Mich. App. 581, 586; 248 N.W.2d 624 (1976)* ("An administrative agency, in addition to following constitutional and statutory mandates, must also comply with its own rules.").

Given the tension between such precedents as they apply to the facts of the prior contested case, we conclude that the ALJ did not clearly abuse his discretion. DEQ's legal position was sufficiently grounded in law [*14] as to have at least some arguable legal merit, and hence it was not "frivolous" under *MCL 24.323(1)(c)*.[3]

3 Having reached that conclusion, we need not address the additional issues raised in the parties' cross-appeals regarding the propriety of the *amount* of costs and attorney fees awarded by the circuit court.

Accordingly, we reverse the circuit court and reinstate the decision of the ALJ. As the prevailing party, DEQ may tax costs pursuant to *MCR 7.219*.

/s/ Kurtis T. Wilder

/s/ William B. Murphy

/s/ Peter D. O'Connell

EXHIBIT B

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

BILL SCHUETTE
ATTORNEY GENERAL

P.O. BOX 30755
LANSING, MICHIGAN 48909

December 7, 2012

Beverly Hague, Clerk
Michigan Administrative Hearing System
Constitution Hall, Atrium South
525 W. Allegan Street
P.O. Box 30473
Lansing, MI 48909

Dear Ms. Hague:

Re: *In the Matter of Grass Lake Improvement Board*
File No. 07-63-0328-P and 09-63-0026-P

Enclosed for filing in the above captioned case are ***Michigan Department of Environmental Quality's Motion to File Brief in Response to Petitioner's Motion for Reconsideration and/or Clarification and Brief in Response to Petitioner's Motion for Reconsideration and/or Clarification*** along with a Proof of Service.

Very truly yours,

Daniel P. Bock

Daniel P. Bock (P71246)
Assistant Attorney General
Environment, Natural Resources, and
Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 373-7540

DPB:pjb
Enc.
cc w/encs: Charles E. Dunn
William Larsen (via e-mail)

LF:/2009-0033498-A/Grass Lake/CL

B

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM

In the matter of	**File No.** 07-63-0328-P and 09-63-0026-P
Grass Lake Improvement Board	**Part:** 301, Inland Lakes & Streams
	Agency: Department of Environmental Quality
	Case Type: Land and Water Management Division

PROOF OF SERVICE

On December 7, 2012, I sent by first class mail a copy of ***Michigan Department of Environmental Quality's Motion to File Brief in Response to Petitioner's Motion for Reconsideration and/or Clarification and Brief in Response to Petitioner's Motion for Reconsideration and/or Clarification*** to:

Charles E. Dunn
Giarmarco, Mullins & Horton, PC
Tenth Floor Columbia Center
101 West Big Beaver Road
Troy, MI 48084-5280

I declare that the statements above are true to the best of information, knowledge, and belief.

Patricia J. Braithwaite

LF:/2009-0033498-A/Grass Lake/POS

STATE OF MICHIGAN

MICHIGAN ADMINISTRATIVE HEARING SYSTEM

In the matter of	**File No.** 07-63-0328-P and 09-63-0026-P
Grass Lake Improvement Board	**Part:** 301, Inland Lakes & Streams
	Agency: Department of Environmental Quality
	Case Type: Land and Water Management Division

Daniel P. Bock (P71246)
Assistant Attorney General
Environment, Natural Resources, and Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 373-7540
Attorney for Respondent MDEQ

Charles E. Dunn (P54791)
Giarmarco, Mullins & Horton, PC
Tenth Floor Columbia Center
101 West Big Beaver Road
Troy, MI 48084-5280
(248) 457-7115
Attorney for Petitioner

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY'S MOTION TO FILE BRIEF IN RESPONSE TO PETITIONER'S MOTION FOR RECONSIDERATION AND/OR CLARIFICATION

The Michigan Department of Environmental Quality Water Resources Division (hereafter "MDEQ"), by and through its attorneys Bill Schuette, Attorney General for the State of Michigan, and Daniel P. Bock, Assistant Attorney General, and requests that this Tribunal allow the MDEQ to file the attached Brief in Response to Petitioner's Motion for Reconsideration and/or Clarification.

The Petitioner filed its Motion for Reconsideration and/or Clarification on November 1, 2012. The administrative rule that governs motions for reconsideration in contested case hearings does not provide for a response from the opposing party unless requested by the Administrative Law Judge. Mich Admin Code R 324.75. At the December 6, 2012 prehearing conference, the Administrative Law Judge in this matter requested a response from the MDEQ, and counsel for the Petitioner stated that such a request would be unopposed. Therefore, the MDEQ now requests that this tribunal allow the submission of the attached Brief in Response to Petitioner's Motion for Reconsideration and/or Clarification.

Respectfully submitted,

Bill Schuette
Attorney General

Daniel P. Bock (P71246)
Assistant Attorney General
Attorney for Respondent Michigan
Department of Environmental Quality
Environment, Natural Resources,
and Agriculture Division
525 W. Ottawa Street
P.O. Box 30755
Lansing, MI 48909
(517) 373-7540

Dated: December 7, 2012

ENRA/cases/2009-0033498-A/Grass Lake/motion to file brief in response 2012-12-07

STATE OF MICHIGAN

MICHIGAN ADMINISTRATIVE HEARING SYSTEM

In the matter of	**File No.** 07-63-0328-P and 09-63-0026-P
Grass Lake Improvement Board	**Part:** 301, Inland Lakes & Streams
	Agency: Department of Environmental Quality
	Case Type: Land and Water Management Division

Daniel P. Bock (P71246)
Assistant Attorney General
Environment, Natural Resources, and Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 373-7540
Attorney for Respondent MDEQ

Charles E. Dunn (P54791)
Giarmarco, Mullins & Horton, PC
Tenth Floor Columbia Center
101 West Big Beaver Road
Troy, MI 48084-5280
(248) 457-7115
Attorney for Petitioner

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY'S BRIEF IN RESPONSE TO PETITIONER'S MOTION FOR RECONSIDERATION AND/OR CLARIFICATION

INTRODUCTION

The Michigan Department of Environmental Quality Water Resources Division (hereafter "MDEQ") agrees in part with the Motion for Reconsideration filed by the Petitioner in this matter. The MDEQ agrees that the Director

committed palpable error in the Final Determination and Order (hereafter "FDO") issued on October 11, 2012. However, unsurprisingly, the MDEQ disagrees with the Petitioner about what that error was.

In its Motion for Reconsideration, the Petitioner correctly argues that there is no need for a hearing to determine the facts in this matter. (Petitioner's Motion, at 3.) The facts are more or less undisputed: the Petitioner has applied for a permit to use an augmentation well to pump groundwater into Grass Lake, thereby raising the level of the lake. (Permit Application.) The question at the heart of this dispute is not a question of fact, but of law: whether that proposed lake augmentation is regulated by Part 301, Inland Lakes and Streams, of the Michigan Natural Resources and Environmental Protection Act, MCL 324.30101 *et seq.*

For the reasons set forth below, the October 11, 2012 FDO contains a palpable error – specifically, that a hearing is needed to establish facts upon which the Director can base a decision. (FDO, at 3.) However, contrary to the arguments set forth by the Petitioner throughout this matter, a hearing is not needed because the proposed project is clearly regulated by Part 301, and is controlled by the plain language of MCL 324.30102(d), not Administrative Rule 281.811(e).

ARGUMENT

I. A hearing is not necessary to develop the facts of this case, because the facts are not in dispute.

There is no dispute over the basic facts of what the Petitioner proposes to do in its permit application. The Petitioner proposes to install an augmentation well to

pump ground water into Grass Lake, thereby raising the lake level. This gives rise to the purely legal question at the heart of this dispute: whether adding water to an inland lake to raise the lake level constitutes enlarging the lake under Part 301, Inland Lakes and Streams, of the Natural Resources and Environmental Protection Act, MCL 324.30101 *et seq*.

Part 301 provides that a person may not enlarge an inland lake or stream without first obtaining a permit from the MDEQ. MCL 324.30102(d). Administrative rule 281.811(e) defines "enlarge" in such a way as to not include adding water to the lake to raise the lake level. Mich Admin Code R 281.811(e). However, it is the MDEQ's position, based on guidance from the courts, that raising the level of a lake is enlarging the lake under the plain language of Part 301. So the language of the statute clearly regulates the proposed project, but the language of the MDEQ's administrative rule does not.

The Administrative Law Judge's Proposal for Decision (PFD) in this matter correctly ruled that adding water to a lake to raise the lake level is enlarging the lake under Part 301. (PFD at 5-6.) The PFD also correctly found that this activity is regulated under Part 301. (PFD at 5-6.) However, the PFD then erroneously stated that, despite the fact that this activity is regulated under the plain language of Part 301, the Department may not enforce Part 301 here because the language of the statute is contradicted by the language of the Department's administrative rule. (PFD at 10-11.)

This ruling gives rise to another purely legal question: when the plain language of a statute conflicts with the plain language of an administrative rule, which is the controlling law? As set forth below, Michigan law is painstakingly clear that it is the statute, not the rule, that controls. In the FDO, the Director opted not to address this issue, instead holding that there must be a hearing on the facts of the case. (FDO, at 3.) However, because there is no dispute that the Petitioner proposes to raise the lake level, a hearing would be of no use to the Parties in deciding this issue. Therefore, the Director should reconsider the FDO in light of the fact that Michigan law is clear that, when a statute and a rule conflict, it is the statute that prevails.

II. The proposed project is clearly regulated under the plain language of Part 301, and it is that statutory language that controls the dispute in this case, not the administrative rule.

The proposed project is regulated under Part 301 because it seeks to enlarge an inland lake. The MDEQ is legally required to follow the statute at issue, even if its own administrative rule contains language to the contrary.

A. The purpose of the proposed project is to use an augmentation well to enlarge Grass Lake by adding water, which will both raise the lake level and increase the surface area of the lake.

The plain language of Part 301 provides that a person may not enlarge an inland lake without a permit from the MDEQ. MCL 324.30102(d). In the past, the MDEQ only interpreted this to mean dredging out bottomlands to increase the footprint of a lake. Mich Admin Code R 281.811(e). However, based upon guidance

from the Mecosta County Circuit Court and, subsequently, the Attorney General's office, the MDEQ determined that this interpretation violated the plain language of the statute because it allows people to enlarge inland lakes by raising the lake level without a permit.

Increasing the water level and surface area of a lake by adding water to it clearly constitutes enlarging that lake under Part 301. The American Heritage Dictionary defines "enlarge" as "To make larger; *add to*; magnify . . . To become larger; grow." (American Heritage Dictionary of the English Language, College Edition, 1976, at 435, emphasis added). Adding water to a lake clear clearly constitutes "adding to" the lake and "making it larger." The PFD submitted by the Administrative Law Judge in this matter agreed, finding that:

> The Petitioner's argument also runs contrary to the definition and ordinary meaning of "enlarge." Black's Law Dictionary defines "enlarge" as "to make larger" and "to increase." (Black's Law 2d Edition). The fact that Petitioner is merely maintaining Grass Lake's ordinary high water mark (or some level below that) is wholly irrelevant because the Petitioner's proposed activity enlarges Grass Lake by adding nearly 1.15 million gallons of water to it every day . . . [PFD, at 5-6.]

The Petitioner has argued throughout this proceeding that the MDEQ's current, correct interpretation of Part 30102 violates the MDEQ's own administrative rule. This is true; the MDEQ does not dispute it. However, that administrative rule violates the plain language of Part 301 and, when a statute and an administrative rule conflict, the statute controls. The Petitioner has cited no

authority to indicate that the MDEQ's inaccurate administrative rule somehow trumps a statute, and indeed none exists.

B. When a statute and an administrative rule conflict, the statute controls.

Michigan law is overwhelmingly clear (and has been for over half a century) that administrative rules must comply with statutes and, when a statute and a rule conflict, the statute controls. (Michigan Pleading and Practice § 60:26 (*citing Michigan Sportservice, Inc v Nims Turf Service, Inc*, 319 Mich 561; 30 NW2d 281 (1948); *Guss v Ford Motor Co*, 275 Mich 30; 265 NW2d 515 (1936); *Kurtz v Shawley Motor Freight Co*, 270 Mich 112; 258 NW 421 (1935)).

The Michigan Supreme Court has stated, as far back as 1948, that "The provision of the rule must, of course, be construed in connection with the statute itself. In case of conflict, the act governs. It is not within the power of the department . . . to extend the scope of the act." *Michigan Sportservice*, 319 Mich at 566.

Even the case relied upon in the July 31, 2012 PFD, *MICU v City of Warren*, actually supports the fundamental principle that statutes trump rules, not the other way around. That case concerned a conflict between an administrative rule (a minimum height requirement for fire fighters) and a statute (the Elliott-Larsen Civil Rights Act). *MICU v City of Warren*, 147 Mich App 573; 382 NW2d 823 (1985). The Michigan Court of Appeals ruled that the statute's prohibitions against discrimination trumped the City of Warren's administrative rule establishing a

minimum height requirement for fire fighters. *MICU*, 147 Mich App at 582. In other words, the statute trumped the rule.

In that same opinion, the Michigan Court of Appeals noted, in dicta, that an administrative agency is not free to ignore or violate its own properly promulgated rules. *MICU*, 147 Mich App at 584. It is this statement that the Administrative Law Judge relied upon in the Opinion and Order. (July 31, 2012 PFD at 10.) However, this reliance was misplaced for two reasons.

First, it is mere obiter dictum – the question before the Court of Appeals was not whether agencies can ignore their own rules but, rather, what happens when a rule conflicts with a statute. The statement that agencies cannot violate their own rules was made by the Court of Appeals, but was not necessary for the disposition of the case, and therefore is not binding authority and does not set a precedent. Black's Law Dictionary, p 1100 (7th ed 1999); *Central Green Co v United States*, 531 US 425, 431 (2001).

Second, as noted above, there is ample binding authority to support the proposition that a statute trumps a rule. To find that the MDEQ can ignore a statute as long as it follows its rules thus violates common law established by the Michigan Supreme Court as well as a statute enacted by the Legislature.

As noted by the Administrative Law Judge in the July 31, 2012 PFD, administrative agencies are creatures of statute. *Castro v Goemaere*, 53 Mich App 78; 218 NW2d 395 (1974). An agency's authority is derived from statute, and part of that authority includes promulgating administrative rules pursuant to the

Administrative Procedures Act to govern the enforcement of statutes. However, it is patently absurd to conclude that an agency, which is created by a statute and derives is rule making authority from statute, can enact an administrative rule which contradicts the statute.

As Kim Fish testified at the Circuit Court trial in this matter, the MDEQ has worked for years to change the faulty administrative rule, but such changes can take a very long time due to debate amongst the relevant stakeholders as to what should be changed, how it should be changed, etc. (Exhibit A; Tr. Vol. 1, 130:2-131:19.) Until that rule is formally changed, the MDEQ has correctly changed its interpretation of "enlarge an inland lake" to conform with the statute, as required by law.

It is well settled law that an agency may adopt reasonable procedures to effectuate its statutory obligations. The Michigan Court of Appeals has held:

> Administrative bodies are inherently limited in their powers, being creatures of statute or constitution. Their powers generally do not exceed those expressly conferred upon them. But this rule is necessarily qualified by reason and practicality. Typically entrusted with the administration of complex programs, administrative bodies cannot properly function if burdened with inflexible procedure. Administrative authority thus extends beyond that expressly granted to that necessarily implied. [*Turner v General Motors Corp*, 70 Mich App 532, 543; 246 NW2d 631 (1976.]

Because the MDEQ is an administrative agency that is created by statute, and because all of its authority derives from statutes, the MDEQ is not free to enact administrative rules that conflict with the plain language of statutes. If it does so

(as is the case here), it is bound by law to apply the statute as written until the rule can be changed.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, the Petitioner's Motion for Reconsideration should be granted to the extent that a new FDO can be issued in accordance with Michigan law as set forth in this Brief.

Respectfully submitted,

Bill Schuette
Attorney General

Daniel P. Bock (P71246)
Assistant Attorney General
Attorney for Respondent Michigan
Department of Environmental Quality
Environment, Natural Resources,
and Agriculture Division
525 W. Ottawa Street
P.O. Box 30755
Lansing, MI 48909
(517) 373-7540

Dated: December 7, 2012

A

A Correct.
Q Sometimes the level of a lake is below the ordinary high water mark?
A Correct.
Q If a proposed project seeks to raise the level of a lake, not above the ordinary high water mark, but above what it typically is in its natural state, or currently is in its natural state, is that still enlarging an inland lake?
A According to this guidance document, yes.
Q Now -- I'm sorry; I'm trying to read my handwriting here. You testified earlier that what's described in the guidance document is not necessarily included in the administrative rule Mr. Dunn has been referencing, correct?
A Correct.
Q Okay. But do you feel that it's included in the plain language of the statute?
A I do.
Q Okay. If there's potential conflict in a situation between an administrative rule enacted by an agency, and a law enacted by the legislature, which do you apply?
A The statute.
Q Okay. And you testified earlier that since the Mecosta County Nestle case, the current administrative rule has not been rescinded; is that correct?

A That is correct.
Q But new administrative rules have been proposed?
A They have been proposed, yes.
Q Okay. Now, can you briefly explain the rule-making process; what does that entail?
A I might not get it exactly correct, but there are procedures spelled out in the Administrative Procedures Act. The first is that we have to submit a request for rules, and then once that is done, we can form a stakeholders committee to help us identify rules that ne updating or changed, and help draft those rules. Once the rules are drafted, there's a public noticing process and public noticing period to collect public comment on those rules, and then they're submitted to the new agency that I can't remember the name of right now off the top of my head --
Q Would that be the office of rules and regulations?
A Most likely, yes. They keep changing the name of it.
Q Now, this process, does it sometimes take a long time?
A It frequently takes a very long time, yes.
Q And you mentioned earlier that there was an issue with the stakeholders committee, which you mentioned a second ago, in this particular case. Can you explain that a little bit?
A We submitted a request for rule-making and formed a

stakeholders committee several years ago, and I can't remember the exact year. The committees met for a lengthy period, at least two years, discussing rule changes for -- specifically for Part 301. The stakeholder committee eventually broke down and could not reach agreement on just about everything in the rules, and therefore at that point, the department decided not to proceed with rules because we were also at the same time being audited by the Environmental Protection Agency regarding our compliance with the Federal Clean Water Act.

Q Okay. And is that rule-making procedure going to resume at some point?

A Yes. We recently submitted a -- a new request for rule-making, so we will begin the process again.

Q Okay. And so is it fair to say that the DEQ has been attempting to amend this rule for quite some time?

A Yes.

Q Okay. And it just hasn't worked out yet?

A Correct.

Q In the meantime, DEQ has a rule that potentially conflicts with the statute, and the DEQ's policy, correct me if I'm wrong, is to apply the statute rather than the rule, correct?

A Correct.

Q Now -- now, Plaintiff's -- Plaintiff's Exhibit A, the

guidance document, was enacted in 2006, correct?

A Correct.

Q Okay. And was this the culmination of a process to develop a guidance document?

A Yes. It was a lengthy process involving staff and advice from staff from the office of the attorney general and some public review.

Q Okay. Now, Mr. Dunn asked you earlier if employees at the DEQ are bound to follow a guidance document. And -- guidance documents, sorry. And you testified, I believe that staff is expected to follow it. Were you referring to an internal department expectation, or is there a legal rule that an internal guidance document is legally binding upon members of the DEQ?

A As far as I'm aware it's just internal department expectations.

Q So in other words, you mean that if you found out an employee was deviating from the way the department interprets a statute, that might be cause for concern?

A Correct.

Q Okay. Now, is it accurate to say that the staff is bound to follow the statute above all else?

A Yes.

Q Now, on direct Mr. Dunn characterized the -- the guidance document as a moving target. Do you feel that's an

EXHIBIT C

STATE OF MICHIGAN

DEPARTMENT OF ENVIRONMENTAL QUALITY

SUBJECT: Part 303, Wetlands Protection and Part 301, Inland Lakes and Streams, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended

Petition of Grass Lake Improvement Board

File No. 09-63-0026-P

FINAL ORDER ON MOTION FOR RECONSIDERATION

This case involves an application submitted by Grass Lake Improvement Board (Petitioner) seeking regulatory permission under Part 301 to utilize an augmentation well for the purpose of raising the water level of Grass Lake. The pumping of water would occur during warmer months to enhance recreational activities on the lake. The well itself is 500 feet away from the lake and there is only incidental activity occurring on the bottomlands.

In the early stages of this case, the Petitioner requested permission to hold the case in abeyance while it pursued an action in the Oakland County Circuit Court. With agreement of the Department of Environmental Quality (Department), Water Resources Division (WRD), the case was held in abeyance pending the Circuit Court action. The Circuit Court found that it did not have jurisdiction to decide the matter, and the Petitioner pursued an appeal to the Court of Appeals.[1] In the meantime, the Petitioner requested that the contested case move forward on motions. In accordance with this procedure, the Petitioner filed a motion and the WRD filed a reply.

[1] The Court of Appeals recently issued its decision affirming the Oakland County Circuit Court. *Grass Lake Improvement Board v Michigan Department of Environmental Quality*, unpublished memorandum opinion of the Court of Appeals, issued February 14, 2013 (Docket No. 306991).

On July 31, 2012, the Administrative Law Judge (ALJ) issued an Opinion and Order granting Petitioner's Motion concluding that the Department did not have jurisdiction over the proposed activity under Part 301. The basis for this ruling is because there was no activity proposed to occur on the bottomland of Grass Lake as required by the definition of "enlarge" found in Rule 281.811. On August 6, 2012, the WRD filed a Motion to Treat the July 31, 2012 Opinion and Order as a Proposal for Decision (PFD), and allow for the filing of Exceptions. That motion was granted by Order issued on August 23, 2012. Both parties filed Exceptions to the PFD and the Director issued a Final Order on Motion October 11, 2012. That Order remanded the case to the ALJ to develop a factual record.

The Petitioner then filed the pending Motion for Reconsideration arguing that there are no material facts at issue to be decided through conducting an evidentiary hearing. The WRD agrees with the Petitioner that there are no material facts at issue to decide whether the Petitioner's augmentation project is regulated. Based on the party's stipulation in this regard, I find as a matter of fact, there are sufficient facts on this record to rule on this legal issue. Basically, the undisputed material facts are that the Petitioner's proposed project adds water to the lake via a well located some 500 feet away with the water being carried by a surface drain. The parties agree that there is only incidental activity on the bottomlands that could otherwise be permitted. Therefore, the lynch-pin issue of this case is whether this proposed activity will "enlarge" the lake as that term is defined under Part 301 and the administrative rules. Deciding this issue is not as straight-forward as one may believe. It involves an analysis of both statutory and regulatory interpretation as well as the interplay between statutes and rules. It also involves subtle distinctions between the authority of courts versus that of administrative agencies.

ORDER

The WRD's argument is that under the plain language of Part 301 a person may not enlarge an inland lake without a permit from the Department. MCL 324.30102(d). Thus, it concludes the proposed activity is regulated. Citing merely the statute the WRD is correct. However, within Part 301 the legislature gave the Department the authority to promulgate rules. MCL 324.30110(1). Under this authority, the Department did promulgate an administrative rule and it provides a definition for "enlarge" that requires activity on bottomland, such as dredging, before an enlargement takes place. Rule 281.811(e). This definition essentially restricts the Department's jurisdiction over a proposed activity that may indeed "enlarge" a lake, but does not engender activity on bottomland.

The WRD and all of its predecessors applied Rule 281.811(e) from the beginning of regulation under the Inland Lakes and Streams Act until the Circuit Court ruled in the *Nestle Waters* case in 2003.[2] In *Nestle Waters* the Court pointed out that the Rule was more restrictive than the Statute. Kim Fish testified at the Oakland Circuit Court trial in this matter that the Department has worked for years to change the rule, but such changes can take a very long time due to debate amongst the relevant stakeholders as to what should be changed, how it should be changed, etc. (Exhibit A; Tr. Vol. 1, 130:2-131:19). Since 2003 the WRD has been applying the statute to regulate such activities and ignoring its rule. In 2006 it issued the "Guidance Document" so that these activities would be regulated consistently state-wide.

In its Brief in Response to Petitioner's Motion for Reconsideration and/or Clarification, the WRD argues that it properly ignores the Rule because it conflicts with the statute. The WRD does not point to any specific or particular conflict other than under the statute the proposed lake augmentation project would be regulated while acknowledging that under the Rule it would not be. The Brief states:

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[2] See generally the PFD, page 9.

> However, based upon guidance from the Mecosta County Circuit Court (*Nestle Waters* case) and, subsequently, the Attorney General's office, the MDEQ determined that this interpretation violated the plain language of the statute because it allows people to enlarge inland lakes by raising the lake level without a permit. Brief, p. 4-5.

First, the Mecosta County Circuit Court in *Nestle Waters* was hearing a case brought under Michigan Environmental Protection Act (MEPA). MCL 342.1701 *et seq.* Although administrative rules are also binding on circuit courts, in MEPA cases the circuit court is authorized to ignore both statutes and rules if it finds they are not adequate to protect the natural resources. Under MEPA, a circuit court is authorized to create environmental common law that adequately protects the natural resources at issue. The Department has no such authority under MEPA or any other statute. Therefore, I conclude that the WRD is mistaken in its belief that the Mecosta County Circuit Court was providing it guidance regarding this issue in *Nestle Waters.*

Second, the WRD asserts that the Rule conflicts with the plain language of the statute and, therefore, the statute must control. It does not assert that the Rule is ambiguous and requires interpretation. In its Brief it admits that it is violating its own Administrative Rule. Brief, p. 5. Again, the WRD does not point to a specific or particular conflict between the statute and the rule. It only cites to a different result in regulating a proposed project when considering it under the Statute versus the Rule. The Statute does not define the word "enlarge" while the Rule does. This fact, in and of itself, is not a conflict per se. The WRD's argument would be stronger if the particular statutory language had been amended after the rule was promulgated, or if the statute changed the criteria for jurisdiction. However, the opposite is true. Section 324.30102(d) has not been amended since the Rule was promulgated. Further, because other sections of Part 301 have been subsequently amended by the legislature, the legislature's inaction in light of the existing rule is an acknowledgement that the Department's rule is correct. See *Canterbury Health Care, Inc.* v *Department of*

Treasury, 220 Mich App 23, 558 NW2d 444 (1996); *Dykstra* v *Department of Natural Resources,* 198 Mich App 482, 499 NW2d 367 (1993).

The WRD is correct in that Michigan law is overwhelmingly clear that administrative rules must comply with the statute and, when a statute and a rule conflict, the statute controls. Brief, p. 6. However, this conclusion does not provide the WRD with a basis to simply ignore its own rule. First, it is the circuit courts of this State that have the authority to determine the validity or invalidity of rules. *Dykstra,* supra. It is not within the Department's authority under the circumstances of this case to make that determination and then unilaterally and informally take a course of action contrary to the Rule. It is totally inconsistent for the WRD to acknowledge it needs to modify the rule, and then decide to ignore it before a modification is made.

More specific and correctly stated in the PFD, a major and overriding tenant of administrative law is that an agency is bound by its administrative rules.

Michigan case law has also made it clear that departments must follow their own administrative rules once properly promulgated. Particularly pertinent to the instant case is the holding in *MICU v. City of Warren.* In that case, the Michigan Court of Appeals found that "once promulgated, the rules made by an agency to govern its activity cannot be violated or waived by the agency that issued the rules," and for an agency to act contrary to the rule, it must be changed. *MICU v. City of Warren*, 147 Mich App 573, 584, 382 NW 2d 823, 828 (1985) (citing *De Beaussaert v. Shelby Twp.,* 122 Mich App 128, 129, 333 NW 2d 22 (1982)). Even if the rule is inconsistent with the statute, an agency must change its rule before acting counter to it. *Id.* Therefore, even though the current administrative rule narrowly defines the term enlargement when the plain text of the statute is broad, the inconsistency does not serve as a legitimate basis to bypass Rule 281.811(e). PFD, p. 10.

The informal Guidance Document regarding augmentation wells issued by the WRD in 2006 is without legal or procedural support and cannot be followed. The WRD must follow Rule 281.811(e) until it is either amended or rescinded in a manner consistent with the Administrative Procedures Act.

Based upon the forgoing I conclude, as a Matter of Law:

1. Rule 281.811(e) was properly promulgated and is binding.
2. Because the Petitioner proposes no activity on bottomland of Grass Lake, its proposed augmentation project of simply adding water to the lake is not regulated under Part 301.
3. The WRD's Guidance Document on water augmentation project is without legal effect.

NOW, THEREFORE, IT IS ORDERED:

1. The PFD issued on July 31, 2012, is hereby adopted and incorporated by reference in this Order.
2. The Petitioner's Motion for Reconsideration on the issue of whether its proposed lake augmentation project it regulated under Part 301 is GRANTED.
3. The ALJ shall process this case consistent with this Order.

Dated: 5.1.13

Dan Wyant, Director
Department of Environmental Quality

EXHIBIT D

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM

In the matter of

Grass Lake Improvement Board /

File No.: 09-63-0026-P

Part: 301, Inland Lakes and Streams

Agency: Department of Environmental Quality

Case Type: Water Resources Division

Issued and entered
this 17th day of July, 2013
by Richard G. Lacasse
Administrative Law Judge

The Director of the Department of Environmental Quality issued a Final Order on May 1, 2013, disposing of the Part 301 issues surrounding this case. Subsequently, the parties had some difficulty in resolving the issues involving Part 303, Wetlands Protection, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended. On May 9, 2013, the Water Resources Division (WRD) filed a Motion for Summary Disposition based on the fact that it issued a permit to Grass Lake Improvement Board (Petitioner). On May 21, 2013, the Petitioner filed a Response to the Motion objecting to summary disposition in part because the permit did not represent the application date for ceasing lake augmentation. On May 23, 2013, the WRD filed a Reply Brief and on May 31, 2013, the Petitioner filed a Response to the Reply Brief.

Based on the above Motion, Response, Reply, and the Response to the Reply the Tribunal issued an Order on June 21, 2013, setting the matter for hearing on July 31, 2013 and August 1, 2013. Then on June 24, 2013, the Petitioner filed a Motion for Summary Disposition because the WRD had issued another permit correcting the date. On June 26, 2013, the Petitioner withdrew the Motion because it understood that yet another corrected version of the permit was issued. After having the opportunity to review the newly issued permit, the Petitioner then renewed its Motion for Summary Disposition based on the permit issued by the WRD. On July 11, 2013, the WRD filed a Brief in Response to Petitioner's Motion for Summary Disposition. In that Response the WRD concurs that the Tribunal should grant the Petitioner's Motion for Summary Disposition. Brief, p. 2.

OPINION AND ORDER

The Petitioner asserts in its Motion for Summary Disposition that this case has become moot because there is no longer any genuine issue as to any material fact that the Petitioner has obtained the relief sought. Petitioner's Motion, p. 3. The WRD stipulates to this result and agrees the issues are moot.

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DETERMINATION AND ORDER AND NOTICE OF HEARING

Based upon the above stipulation, it is DETERMINED that there are no genuine issues of any material fact regarding Part 303, and that summary disposition is appropriate under Rule 324.55(c). An evidentiary hearing is no longer necessary to resolve Part 303 issues.

THEREFORE, IT IS ORDERED:

1. The Petitioner's Motion for Summary Disposition is **GRANTED**.
2. The hearing scheduled in this matter to begin on July 31, 2013, at 9:30 a.m. is **CANCELLED**.
3. This contested case is **DISMISSED**, with prejudice.

Richard G. Lacasse
Administrative Law Judge

PROOF OF SERVICE

I hereby state, to the best of my knowledge, information and belief, that a copy of the foregoing document was served upon all parties and/or attorneys of record in this matter by Inter-Departmental mail to those parties employed by the State of Michigan and by first class mail to all others at their respective addresses as disclosed by the file on the 17th day of July, 2013.

Bev Hague
Michigan Administrative Hearing System

Mr. Charles E. Dunn
Giarmarco, Mullins & Horton, P.C.
Tenth Floor Columbia Center
101 West Big Beaver Road
Troy, Michigan 48084-5280

Mr. Daniel P. Bock
Department of Attorney General
P.O. Box 30755
Lansing, Michigan 48909

Dr. William C. Larsen
Department of Environmental Quality
Water Resources Division
P.O. Box 30458
Lansing, Michigan 48909-7958

Network Reporting
2604 Sunnyside Drive
Cadillac, Michigan 49601

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

BILL SCHUETTE
ATTORNEY GENERAL

P.O. Box 30755
LANSING, MICHIGAN 48909

July 11, 2013

Clerk of the Court
Michigan Administrative Hearing System
Constitution Hall, Atrium South
525 W. Allegan Street
Lansing, MI 48909

Re: *Grass Lake Improvement Board*
File No. 07-63-0328-P/09-63-0026-P

Dear Clerk:

Enclosed is the Michigan Department of Environmental Quality's Brief in Response to Petitioner's Motion for Summary Disposition, along with Proof of Service upon counsel of record.

Sincerely,

Daniel P. Bock (P71246)
Assistant Attorney General
Environmental, Natural Resources,
and Agriculture Division
(517) 373-7540

DPB/kaw
Enclosures
cc: Bill Larsen

LF: Grass Lake Improvement AG#2009-0033498-A/Cover Letter 2013-07-11

EXHIBIT E

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM

In the matter of

Grass Lake Improvement Board

File No.: 09-63-0026-P (cost)

Part: 301, Inland Lakes and Streams

Agency: Department of Environmental Quality

Case Type: Water Resources Division

Issued and entered
this 23rd day of June, 2014
by Daniel L. Pulter
Administrative Law Judge

This contested case arose from a Petition for Contested Case Hearing filed on June 30, 2009, by Grass Lake Improvement Board (Petitioner). The Petitioner applied for a permit to utilize an augmentation well for the purpose of raising the water level of Grass Lake. On June 10, 2009, the Department of Environmental Quality (DEQ), Water Resources Division (WRD), denied the Petitioner's application under Part 301, Inland Lakes and Streams, of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, as amended, MCL 324.30101, et seq., and Part 303, Wetlands Protection, of the NREPA, MCL 324.30301, *et seq.* For the reasons discussed below, the Petitioner was ultimately issued a permit for the project.

The Petitioner now seeks costs and attorney's fees through Petitioner's Request for Hearing and Supporting Evidence for Attorney Fees and Costs Under MCL 24.323 filed on August 5, 2013. The Petitioner filed a Motion for Partial Summary Disposition on February 18, 2014. The WRD filed its Motion for Summary Disposition on February 11, 2014.

OPINION AND ORDER

In order to decide the pending Cross-Motions for Summary Disposition, it is necessary to first discuss the events leading up to its filing. On June 1, 2010, approximately one year after the petition was filed, this case was held in abeyance at the Petitioner's request based on its filing of a declaratory judgment action in Oakland County Circuit Court that sought the same relief as raised in its Petition. On October 17, 2011, the Oakland County Circuit Court issued its Opinion and Order dismissing the case based on a

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lack of subject matter jurisdiction, and the Petitioner's failure to exhaust its administrative remedies. See *Grass Lake Improvement Board v. Michigan Department of Natural Resources & Environment*, Case No. 10-112854-CZ (Oakland County Circuit Court). The Petitioner filed a Claim of Appeal to the Court of Appeals on November 8, 2011. By an unpublished decision dated February 14, 2013, the Court of Appeals affirmed the decision of the circuit court. *See Grass Lake Improvement Board v. Michigan Department of Environmental Quality*, Appeal No. 306991 (Mich. App. February 14, 2013).

After the abeyance of the contested case was lifted, the parties filed Cross-Motions for Summary Disposition. In an Order entered on July 31, 2012, this Tribunal held the WRD did not have jurisdiction over the proposed activity under Part 301. On October 11, 2012, the Director of the DEQ entered an Order on Motions that held a factual record was necessary to decide the jurisdiction issue, and remanded the case for a hearing. In a Motion for Reconsideration, the Petitioner argued that only a legal issue was in contention, and thus a factual record was unnecessary. In its Response to the Petitioner's Motion for Reconsideration, the WRD agreed that only an issue of law was in dispute and a factual record was unnecessary. Accordingly, on May 1, 2013, the Director granted the Motion for Reconsideration, and adopted and incorporated the July 31, 2012 Order.

Based on the Director's holding that the proposed activity was exempt from Part 301 regulation, the WRD issued the Petitioner a permit under Part 303, and filed a Motion for Summary Disposition on the grounds that the permit resolved all contested issues. In Response, the Petitioner opposed the Motion because the permit limited operation of the augmentation well to the period between April 15 until August 1 of each year, while the application sought operation between April 15 through September 30. The WRD's Motion was denied by an Order of this Tribunal on June 21, 2013. The Petitioner also filed its own Motion for Summary Disposition on June 24, 2013, followed by the issuance of a modified permit with the operation period sought by the Petitioner on June 26, 2013. Once the

WRD joined in the Petitioner's Motion, the case was dismissed on July 17, 2013. The Petitioner's Motion for attorney fees and costs followed.

Petitioner's request for costs and attorney's fees is governed by the Administrative Procedures Act:

> (1) The presiding officer that conducts a contested case shall award to the prevailing party, other than an agency, the costs and fees incurred by the party in connection with that contested case, if the presiding officer finds that the position of the agency to the proceeding was frivolous. To find that an agency's position was frivolous, the presiding officer shall determine that at least 1 of the following conditions has been met:
>
> (a) The agency's primary purpose in initiating the action was to harass, embarrass, or injure the prevailing party.
>
> (b) The agency had no reasonable basis to believe that the facts underlying its legal position were in fact true.
>
> (c) The agency's legal position was devoid of arguable legal merit.
>
> MCL 24.323.

If the Petitioner establishes the agency's position was frivolous, the inquiry turns to the appropriate amount of attorney fees and costs.

As discussed above, the parties consistently argued that no facts were at issue in this case. *See* Petitioner's Brief in Support of Motion for Reconsideration and/or Clarification at p. 2 ("There is no factual dispute"); DEQ's Brief in Response to Petitioner's Motion for Reconsideration and/or Clarification at p. 2 ("A hearing is not necessary to develop the facts of this case, because the facts are not in dispute"). Along the same line, since this matter never proceeded to hearing, there are no facts that can be deemed untrue. See MCL 24.272(3); 24.281(2); 24.285. Therefore, it cannot be said the WRD knew the facts underlying its legal position were untrue under MCL 24.323(1)(b).

Entitlement to relief under § 123(1)(c) may also be summarily eliminated based on the Petitioner's argument, that "[t]his case is one that has numerous complex legal and

technical issues." [1] In reviewing the proceedings and pleadings in this case, the Petitioner's characterization of the "numerous complex legal ... issues," is accurate. Given this, the WRD's positions cannot be deemed to be devoid of arguable legal merit under MCL 24.323(1)(c).

This leaves § 123(1)(a) – that the agency's primary purpose in initiating the action was to harass, embarrass, or injure the prevailing party. Again, in considering the record in this case, it cannot be said that the WRD's purpose, let alone its primary purpose, was to harass, embarrass, or injure the Petitioner. This is evident when considering the crux of the Petitioner's case, along with the basis of its pending Request for Hearing and Supporting Evidence for Attorney Fees and Costs Under MCL 24.323, was set forth in the title of the Petitioner's filing on October 26, 2006: Brief in Support of Petitioner's Motion to Strike MDEQ's Guidance Document Related to Lake Level Augmentation Projects Dated October 16, 2006. In that filing, the Petitioner concedes that "[t]he basis of the Department's denial appears to be predicated on its reliance to the Department's guidance document related to lake level augmentation projections dated October 16, 2006." [2] The "Guidance Document," which was attached as Exhibit "1" to the Brief, provides:

> Section 30102(d) of Part 301 requires a permit to "create, enlarge, or diminish an inland lake or stream." Previously, the DEQ has interpreted Section 30102(d) to include only those activities that involve the placement, manipulation, operation or removal of fill or structures to increase or decrease water levels in a lake, stream, or impoundment. This interpretation was promulgated as administrative rule R 281.811(1)(e).
>
> However, the recent circuit court decision in *Michigan Citizens for Water Conservation v. Nestle Waters of North America (Nestle)* and the State of Michigan's amicus brief in the *Nestle* appeal, have stated that this interpretation is overly restrictive and inconsistent with the unambiguous statutory language.

[1] Petitioner's Request for Hearing and Supporting Evidence for Attorney Fees and Costs Under MCL 24.323 at p. 14.
[2] Petitioner's Motion to Strike MDEQ's Guidance Document Related to Lake Level Augmentation Projects Dated October 16, 2006 at p.2.

> After review and discussion with the Department of Attorney General, the DEQ has determined that lake augmentation activities that raise the level of any lake constitute "enlarge[ment]" of a lake and require permits pursuant to Part 301. This includes lakes where a legal lake level has been established pursuant to Part 307, Inland Lake Levels, of the NREPA.[3]

In the Final Order on Motion for Reconsideration, the Director stated that the Guidance Document was issued in 2006 "so that these activities would be regulated consistently state-wide."[4] Accordingly, it is clear that the Guidance Document was issued, after consultation with the Department of Attorney General, so that activities that raise the level of any lake would be regulated consistently state-wide. The Guidance Document was not issued with the primary purpose of harassing, embarrassing, or injuring Petitioner.

Based on the foregoing, the Petitioner has failed to establish WRD's position was frivolous, and thus it is not entitled to attorney fees and costs under MCL 24.323.

NOW, THEREFORE, IT IS ORDERED:

1. The Motion for Partial Summary Disposition as to Attorney Fees and Costs Under MCL 24.323 filed by the Grass Lake Improvement Board is DENIED.

2. The Motion for Summary Disposition filed by the Water Resources Division is GRANTED.

Daniel L. Pulter
Administrative Law Judge

[3] Exhibit "1" to Brief in Support of Petitioner's Motion to Strike MDEQ's Guidance Document Related to Lake Level Augmentation Projects Dated October 16, 2006 at p. 2.
[4] Final Order on Motion for Reconsideration dated May 1, 2013 at p. 3.

PROOF OF SERVICE

I hereby state, to the best of my knowledge, information and belief, that a copy of the foregoing document was served upon all parties and/or attorneys of record in this matter by Inter-Departmental mail to those parties employed by the State of Michigan and by first class mail to all others at their respective addresses as disclosed by the file on the 23rd day of June, 2014.

Bev Hague
Michigan Administrative Hearing System

Mr. Charles E. Dunn
Charles E. Dunn, PLC
5472 Bristol Parke Drive
Clarkston, Michigan 48348

Mr. Daniel P. Bock
Department of Attorney General
P.O. Box 30755
Lansing, Michigan 48909

Dr. William C. Larsen
Department of Environmental Quality
Water Resources Division
P.O. Box 30458
Lansing, Michigan 48909-7958

EXHIBIT F

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM

In the matter of	**File No.:** 09-63-0026-P (cost)
Grass Lake Improvement Board	**Part:** 301, Inland Lakes and Streams
	Agency: Department of Environmental Quality
	Case Type: Water Resources Division

Issued and entered
this 23rd day of July, 2014
by Daniel L. Pulter
Administrative Law Judge

This contested case arose from a Petition for Contested Case Hearing filed on June 30, 2009, by Grass Lake Improvement Board (Petitioner). In an Order entered on July 31, 2012, this Tribunal held the Department of Environmental Quality (DEQ), Water Resources Division (WRD) did not have jurisdiction over the proposed activity under Part 301. On May 1, 2013, the Director of DEQ granted the Motion for Reconsideration, and adopted and incorporated the July 31, 2012 Order.

On August 5, 2013, the Petitioner filed a Request for Hearing and Supporting Evidence for Attorney Fees and Costs under MCL 24.323. The Petitioner thereafter filed a Motion for Partial Summary Disposition seeking its costs and fees on February 18, 2014. The WRD filed its Motion for Summary Disposition opposing the award of costs and fees on February 11, 2014. On June 23, 2014, this Tribunal granted the Motion for Summary Disposition filed by the WRD. On July 21, 2014, the Petitioner filed a Motion for Reconsideration and/or Clarification of the June 23, 2014 Order (Order).

OPINION AND ORDER

The Petitioner contends that the Order was deficient because it did not contain findings of fact and conclusions of law in accordance with §85 of the Administrative Procedures Act (APA). MCL 24.285. The cited provision pertains to a final decision of the agency in the contested case. In this case, the final decision contemplated by Section 85 was the Director's May 1, 2013 Order holding, on purely legal grounds, the proposed activity was not regulated under Part 301.

F

The Order at issue in the Petitioner's pending Motion was issued under §123 of the APA, which requires "[t]he final action taken by the presiding officer under this section in regard to costs and fees shall include written findings as to that action and the basis for the findings." MCL 24.323(4). By its express terms, the Order held the Petitioner had failed to establish entitlement to recovery of costs and fees under any of the standards in MCL 24.323(1), and the legal basis for that holding.

Based on the foregoing, the Petitioner has failed to establish the Order contains palpable error that warrants reconsideration. R 324.75(2). Further, the holding in the Order that entitlement to attorney fees and costs had not been established needs no clarification. Therefore, the Petitioner's Motion for Reconsideration and/or Clarification is without merit.

NOW, THEREFORE, IT IS ORDERED:

1. The Motion for Reconsideration and/or Clarification is **DENIED.**

Daniel L. Pulter
Administrative Law Judge

PROOF OF SERVICE

I hereby state, to the best of my knowledge, information and belief, that a copy of the foregoing document was served upon all parties and/or attorneys of record in this matter by Inter-Departmental mail to those parties employed by the State of Michigan and by first class mail to all others at their respective addresses as disclosed by the file on the 23rd day of July, 2014.

Bev Hague
Michigan Administrative Hearing System

Mr. Douglas R. Kelly
Clark Hill, PLC
151 South Old Woodward Avenue, Suite 200
Birmingham, Michigan 48009

Mr. Charles E. Dunn
Charles E. Dunn, PLC
5472 Bristol Parke Drive
Clarkston, Michigan 48348

Mr. Daniel P. Bock
Department of Attorney General
P.O. Box 30755
Lansing, Michigan 48909

Dr. William C. Larsen
Department of Environmental Quality
Water Resources Division
P.O. Box 30458
Lansing, Michigan 48909-7958

EXHIBIT G

STATE OF MICHIGAN
IN THE 30TH JUDICIAL CIRCUIT FOR INGHAM COUNTY

GRASS LAKE IMPROVEMENT BOARD,

Petitioner,

v

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,

Respondents.

ORDER

CASE NO. 14-1064-AA

HON. WILLIAM E. COLLETTE

At a session of said Court
held in the city of Mason, county of Ingham,
this 31st day of March, 2015.

PRESENT: HON. WILLIAM E. COLLETTE

This matter comes before the Court on Grass Lake Improvement Board's (Petitioner) claim of appeal from a final order by the Michigan Department of Environmental Quality (Respondent) denying Petitioner's request of attorney fees and costs under MCL 24.323. This Court, being fully apprised of the premises, GRANTS Petitioner's motion as to costs and fees incurred in the Michigan Administrative Hearing System, and DENIES Petitioner's motion as to costs and fees incurred in the Oakland County Circuit Court and Michigan Court of Appeals.

FACTS

Petitioner petitioned the Respondent for costs and attorney fees under MCL 24.323 following a lengthy dispute over Petitioner's application for regulatory permission to raise the water level of Grass Lake using an augmentation well. That application resulted in a denial by the Water Resources Division (WRD) and subsequent appeal to

the Oakland County Circuit Court. The circuit court found it did not have jurisdiction to try the case and the Michigan Court of Appeals upheld that decision.

Petitioner moved forward in the Michigan Administrative Hearing System, filing a motion for summary disposition. The Administrative Law Judge granted Petitioner's motion. After several additional motions, a remand by the Director for development of a factual record, and motion for reconsideration by Petitioner, the Director issued a final order granting Petitioner's application in full and holding that Rule 281.811(e) was properly promulgated and is binding.

Petitioner subsequently brought this action for costs and attorney fees under MCL 24.323. The ALJ in that hearing denied Petitioner's motion for disposition and granted instead the WRD's motion for summary disposition. This appeal followed.

STANDARD OF REVIEW

The Administrative Procedures Act provides:

> Except when a statute or the constitution provides for a different scope of view, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or oder is any of the following:
>
> . . .
>
> (e) Arbitrary, capricious, or clearly an abuse or unwarranted exercise of discretion.

A decision is arbitrary if it is "[W]ithout adequate determining principle .... Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned." *Goolsby v City of Detroit*, 419 Mich 361, 378; 358 NW2d 856 (1984) (citing *United States v Carmack,* 329 US 230, 243; 67 S Ct 252 (1946)).

ANALYSIS

MCL 24.323 provides that costs shall be awarded to a prevailing party in a contested case if the presiding officer finds the proceeding was frivolous. In order to find that an agency's position was frivolous, the presiding officer must find that the agency's position was intended to harass, embarrass, or injure the prevailing party, that the agency had no reasonable basis to believe that facts underlying its position were true, or that the agency's position was devoid of arguable legal merit.

Petitioner argues that the ALJ's position was arbitrary and capricious. The ALJ below found that the WRD's position was not devoid of arguable legal merit because the WRD alleged that the case had "numerous complex legal and technical issues" based on his review of the record. The Petitioner argues, and this Court agrees, that this determination fails as a reasoned determination by an administrative agency. The ALJ failed to make any conclusions of fact or law. The ALJ failed to point out any particulars within the record to support such a conclusion. He cited no legal authority and provided no reasoning whatsoever in support of his conclusion. This is the very definition of arbitrary and capricious: unreasoned, without reference to guiding principles or considerations, and a decisive exercise of will or caprice.

Furthermore, Petitioner argues that the WRD's position was frivolous by being devoid of legal merit. This Court agrees. The WRD's position was that there existed a conflict of law between a statute, Part 301, Inland Lakes and Streams, of the Michigan Natural Resources and Environmental Protection Act, MCL 324.0101 *et seq.*, and an administrative rule, Michigan Administrative Code Rule 281.811. The WRD argued that where such conflicts exist, the statute prevails over the rule, which was addressed by the

Mecosta County Circuit Court in 2003 in *Michigan Citizens for Water Conservation v Nestle Waters North America, Inc.*, 2003 WL 25659349 Mich Cir Ct, Nov. 25, 2003.

However, the Director found in his final order that the *Nestle Waters* decision did not constitute guidance for the WRD and its future interpretation of Part 301, primarily because the language of the statute and the language of the Rule were not conflicting per se. The statute at issue does not define what it means to "enlarge" a lake or stream, where that is precisely what the Rule does. The Rule's narrow interpretation of the statute is not a direct conflict.

Furthermore, Michigan case law makes it clear that administrative agencies must follow their own rules once properly promulgated. *MICU v City of Warren,* 147 Mich App 573, 584; 382 NW2d 823 (1985). The Director pointed out that "[ev]en if the rule is inconsistent with the statute, an agency must change its rule before acting counter to it." Here, not only did the Respondent knowingly violate its own rule, it apparently did so for years without attempting to re-promulgate a new rule. Given the overwhelming case law that condemns this exact behavior, it is clear the reliance on a policy that prescribes that behavior is devoid of legal merit, and therefore, the WRD's position in this case was frivolous. This Court grants Petitioner's motion for fees and costs incurred defending its case in the Michigan Administrative Hearing System.

MCL 24.323(5)(b) limits available attorney fees to a rate of $75/hour absent special circumstances justifying a higher rate. Petitioner argues that special circumstances do apply in this case, due to the complex matter of the case, which required highly technical understandings of the natural sciences, engineering, and state and federal environmental law. Furthermore, the Petitioner provided a justification for how it arrived

at the figures requested, relying on financial statistics published by the State Bar and requesting figures in line with the 75th percentile hourly rate. This Court finds the requested rates to be reasonable and justified under the special circumstances of the complexity of this case and the frivolity of the WRD's position.

Under MCL 24.323, fees and costs are limited to the contested case in which Petitioner was the prevailing party. Therefore, the Oakland County Circuit Court action and the appeal to the Michigan Court of Appeals are not recoverable.

THEREFORE IT IS ORDERED that the ALJ's Decision is **REVERSED** and Petitioner is **ENTITLED** to fees and costs incurred defending its position in the Michigan Administrative Hearing System at the rates requested.

IT IS ALSO ORDERED that the Petitioner is **NOT ENTITLED** to fees and costs incurred defending its position before the Oakland County Circuit Court and the Michigan Court of Appeals, docket no. 10-112854-CZ.

Hon. William E. Collette
Circuit Court Judge

PROOF OF SERVICE

I hereby certify that I mailed a copy of the above ORDER which each attorney of record, or upon the parties, by placing the true copy in a sealed envelope, addressed to each, with full postage prepaid and placing said envelope in the United States mail at Mason, Michigan, on March 4, 2015.

Kacie Smith
Law Clerk

EXHIBIT H

STATE OF MICHIGAN\IN
IN THE COURT OF APPEALS

MICHIGAN CITIZENS FOR WATER CONSERVATION, a Michigan nonprofit corporation; R.J. DOYLE and BARBARA DOYLE, husband and wife; and JEFFREY R. SAPP and SHELLY M. SAPP, husband and wife,
Plaintiffs-Appellees/Cross-Appellants,

v

NESTLE WATERS NORTH AMERICA INC., a Delaware corporation,
Defendant-Appellant/Cross-Appellee,

and

DONALD PATRICK BOLLMAN and NANCY GALE BOLLMAN, a/k/a PAT BOLLMAN ENTERPRISES,
Defendants.

Case No. 254202

Mecosta County Circuit Court
Case No. 01-14563-CE
Honorable Lawrence C. Root

BRIEF OF AMICUS CURIAE MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY

Michael A. Cox
Attorney General

Thomas L. Casey (P24215)
Solicitor General
~~Counsel of Record~~

S. Peter Manning (P45719)
Sara R. Gosman (P66907)
Assistants Attorney General
Environment, Natural Resources,

STATE OF MICHIGAN\IN
IN THE COURT OF APPEALS

MICHIGAN CITIZENS FOR WATER CONSERVATION, a Michigan nonprofit corporation; R.J. DOYLE and BARBARA DOYLE, husband and wife; and JEFFREY R. SAPP and SHELLY M. SAPP, husband and wife,
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v

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Counsel of Record

S. Peter Manning (P45719)
Sara R. Gosman (P66907)
Assistants Attorney General
Environment, Natural Resources, and Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 373-7540
Attorneys for Amicus Curiae Michigan Department of Environmental Quality

Dated: May 19, 2005

Table of Contents

Table of Contents (Continued)

Table of Contents (Continued)

Index of Authorities

Index of Authorities (Continued)

Page

Cases

Index of Authorities (Continued)

Page

Cases

Index of Authorities (Continued)

Index of Authorities (Continued)

Index of Authorities (Continued)

Statement of Basis of Jurisdiction of the Court of Appeals

Amicus Curiae Michigan Department of Environmental Quality agrees with the statement of jurisdiction of Defendant-Appellant/Cross-Appellee Nestle Waters North America Inc.

Statement of Questions Involved

I. **Pursuant to its broad authority to regulate activities affecting the waters of the State, the Legislature enacted Part 301 of the Natural Resources and Environmental Protection Act. Among other activities, Part 301 requires a permit to "enlarge or diminish an inland lake or stream." Did the Circuit Court correctly rule that the Department of Environmental Quality's historical interpretation of that requirement – limiting it to contexts where the activity took place on the bottomland of the lake or stream itself – was inconsistent with the plain language of the statute, and that any activity that reduces the level of a lake or stream is regulated by Part 301?**

Amicus Curiae's answer: Yes

II. **Both riparians and owners of property above groundwater have a qualified property interest in the use of water. When there is a conflict between surface uses by riparians and groundwater uses by owners, should that conflict be evaluated using a reasonableness test that balances the competing interests involved?**

Amicus Curiae's answer: Yes

III. **The Michigan Environmental Protection Act places authority in the courts to develop a common law of environmental protection and to define the standards to be applied in a particular case. The use of rote factors or bright line rules by the courts is inconsistent with this responsibility. Is a court authorized under the Michigan Environmental Protection Act to adopt part or all of an environmental statute as a relevant standard to be applied and, in applying that standard, should a court evaluate the impacts on natural resources from both a local and statewide perspective?**

Amicus Curiae's answer: Yes

Statement of Facts

Amicus Curiae Michigan Department of Environmental Quality (DEQ) believes the relevant underlying facts have been adequately described by the parties for purposes of addressing the issues raised by DEQ. DEQ does not necessarily agree with or adopt certain characterizations of those facts in the briefs.

Introduction

This case concerns water, a natural resource found in many forms and of great importance to the State of Michigan. Michigan – the Great Lakes State – is defined by its water resources. The State is bordered by the Great Lakes, inland seas that hold 20 percent of the earth's freshwater supply. Within the State there are more than 11,000 lakes and ponds, 36,000 miles of streams and 5.5 million acres of wetlands. Aquifers beneath the State hold large reservoirs of groundwater.

While the State's water resources are abundant, they are not infinite. In addition to its environmental and natural resource values, water is used for many purposes in Michigan, including public water supply, thermoelectric power, agriculture, manufacturing, and recreation. The Great Lakes are also subject to similar uses in other States and provinces in the Great Lakes Basin. Increasing conflicts between these and other uses are inevitable as demand continues to grow. These conflicts will be especially acute in areas where local water supplies have already been depleted through extensive use.

The public interest in the protection of water resources for use of the public as a whole is established and traces its roots to Roman law. The State's clear authority and obligation to protect and conserve water resources stems from three primary sources. The first source is the police power – the wide-ranging sovereign authority to provide for the public health, safety, and welfare. The second is the Constitutional imperative to protect the State's natural resources from pollution, impairment, and destruction. Const 1963, art 4, § 52. And the third is the common law Public Trust Doctrine, by which navigable waters are held in trust for the benefit of the public.

Part 301, Inland Lakes and Streams, of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, as amended, MCL 324.30101 *et seq*, is one of many

statutes enacted by the Legislature to protect the public interest in water resources, specifically inland lakes and streams. Among the requirements of the statute is that a permit be issued to "[c]reate, enlarge or diminish an inland lake or stream." MCL 324.30102(d). The Michigan Department of Environmental Quality (DEQ) acknowledges that it has historically misapplied this provision to exclude many activities that reduce the level or volume of inland lakes and streams. The Circuit Court correctly held that DEQ's historical interpretation was overly restrictive and that an activity that causes a decrease in the level of an inland lake or stream requires a permit.

The public's interest in water serves as the foundation for doctrines limiting private water rights to rights to use of water, rather than absolute ownership. A significant issue in this matter is how to preserve a conflict between an overlying owner's use of groundwater and a riparian owner's use of surface water. The Circuit Court correctly recognized that Michigan courts apply a wide-ranging balancing test to determine the reasonableness of a use when confronted with conflicts between riparian uses and conflicts between groundwater uses. But rather than extend that test, the Circuit Court fashioned a new rule that gives absolute protection to surface water uses when they are impacted by off-site groundwater uses.

This Court should acknowledge the interconnections between groundwater and surface water by holding that a balancing test designed to evaluate the reasonableness of uses applies to groundwater-riparian conflicts. As it has evolved in Michigan cases, this test balances a number of factors to weigh the competing interests of the users, including the purpose and nature of the use, the harm caused by the use, the benefit of the use, the existence of other uses, and the condition of the water body. Domestic uses, or traditional uses on the land, are given preference as against other uses. While the Circuit Court made detailed findings of fact on the extent and

nature of harm to the surface water body, the Court did not address the other factors. Therefore, the matter should be remanded to the Circuit Court with instructions to do so.

Finally, it is not apparent on what basis the Circuit Court determined that Nestle's groundwater use violated Part 17, Michigan Environmental Protection Act (MEPA), of NREPA, MCL 324.1701 *et seq*. The Circuit Court relied heavily on Part 301 and Part 303, Wetland Protection, of NREPA, MCL 324.30301 *et seq*, for its MEPA analysis. After *Preserve the Dunes, Inc v Michigan Dep't of Environmental Quality*, 471 Mich 508; 684 NW2d 847 (2004), Parts 301 and 303 could be used in at least two ways: (1) the Circuit Court could determine that the statutes contain relevant and applicable pollution standards, in which case a violation would be a prima facie showing; or (2) some or all of the substantive standards could be used to define an appropriate standard by which to measure environmental harm. The MEPA claim should be remanded so that the Circuit Court can clarify its use of Parts 301 and 303 as statutory standards.

Assuming Parts 301 and 303 are appropriate standards, the Court failed to adequately support its MEPA analysis in its decision. On remand, the Court should apply specific facts to the statutory criteria to support its determination that Plaintiffs-Appellees Michigan Citizens for Water Conservation, *et al* (collectively MCWC) made a prima facie showing. The Court should also explain why Nestle did not put forth evidence sufficient to support the defenses provided by MEPA.

The Circuit Court should not be instructed to apply what Nestle suggests is a "statewide perspective," i.e., treating water as a non-distinct, fungible resource. While evaluating impacts from a statewide perspective may be relevant under the circumstances of a given case, it is not the sole "perspective" and is inappropriate here to the extent it ignores local environmental effects. The resources at issue – wetlands and streams – offer distinct benefits to the local

environment that cannot be served by wetlands and streams on the other side of the State. Indeed, assuming Parts 301 and 303 are appropriate statutory standards, they clearly require evaluation of the individual resource.

Argument

I. To protect the public's paramount interest in the waters of the State, the State has the inherent and constitutional authority to regulate a variety of activities affecting those waters. Pursuant to this authority the Legislature enacted Part 301 of the NREPA, which, among other things, regulates activities that "enlarge or diminish an inland lake or stream." The Circuit Court correctly held that DEQ's historical interpretation of that provision is overly restrictive and inconsistent with the unambiguous statutory language. If a groundwater withdrawal will diminish an inland lake or stream it requires a permit under Part 301.

A. Standard of Review

The question of the scope of the State's authority under Part 301 of the NREPA involves the interpretation of a statute and review of an administrative agency's interpretation of that statute through administrative rule. Questions of statutory interpretation are reviewed *de novo*. *Manske v Dep't of Treasury*, 265 Mich App 455, 457; 695 NW2d 92 (2005). Deference is provided to an agency's interpretation of a statute or rule it implements, but only if the language of the statute or rule is ambiguous. *Romulus v Dep't of Environmental Quality*, 260 Mich App 54, 65-66; 678 NW2d 444 (2003).

B. The State possesses broad authority to regulate activities that affect the waters of the State, which includes the groundwater and surface water within its borders. The Legislature has extensively regulated the use of these waters through statute.

The Attorney General recently addressed the question of the extent of the authority of the State to regulate the withdrawal and uses of the waters of the State. OAG 2004, No 7162, p ___, 2004 Mich AG LEXIS 18 (September 23, 2004). As discussed in that opinion, the public has a significant interest in, and the State has broad authority over, all waters, surface and ground, within its borders.

Protection of water resources for the benefit of the public as a whole, with a corresponding limitation on the right to private appropriation, has a long pedigree that can be traced to Roman law. The sixth century Institutes of Justinian declared, "By law of nature these

things are common to all mankind – the air, running water, the sea, and consequently the shore of the sea." The Institutes of Justinian bk 2, tit 1, pts 1-6, at 65 (J. Thomas trans 1975). In *People v Hulbert*, 131 Mich 156, 160-173; 91 NW 911 (1902), the Supreme Court surveyed numerous cases discussing the common law rules regarding water use that had evolved from this principle:

> Flowing water, as well as light and air, are in one sense 'publici juris' [owned by the public]. They are a boon from Providence to all, and differ only in their mode of enjoyment. Light and air are diffused in all directions, flowing water in some. When property was established, each one had the right to enjoy the light and air diffused over, and the water flowing through, the portion of the soil belonging him. The property in the water itself was not in the proprietor of the land through which it passes, but only the use of it, as it passes along, for the enjoyment of his property and incidental to it. The law is laid down by Chancellor Kent, in 3 Com. 439, thus: 'Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water. * * * He has no property in the water itself, but a simple usufruct as it passes along.' *People v Hulbert* at 160 [Quoting *Wood v Waud*, 3 Exch 748.]

Thus, the public's interest in water resources is long recognized and it has long been established that surface water riparians have a right of use – a usufructory right – in water on and below their property, and not absolute ownership. *See, e.g., Preston v Clark*, 238 Mich 632, 639; 214 NW 226 (1927) (riparians have right of use incident to the land). This principle has also been applied to overlying property owner's use of groundwater. *See, e.g., United States Aviex Co v Travelers Insurance Co*, 125 Mich App 579, 590-591; 336 NW 2d 838 (1982) ("[Supreme] Court clearly rejected the right of absolute ownership over percolating ground water"). A usufruct is defined as a "right of enjoying a thing, the property of which is vested in another, and

to draw from the same all the profit, utility, and advantage it may produce, provided it be without altering the substance of the thing." *Black's Law Dictionary*, Abridged Fifth Edition (1983).[1]

The recognition of the common interest in water and the corresponding limitation on private rights of appropriation is readily understood because of the fundamental role water plays – not only for basic needs like drinking water, irrigation of crops, and as sources of fish and wildlife, but for commerce and recreation. And from these ancient principles has evolved the clear authority and obligation to protect water resources.

In Michigan, that authority stems from three primary sources. First, is the fundamental and inherent sovereign authority to provide for the public health, safety, and welfare – the police power. *Pollard v Hagan*, 44 US 212; 11 L Ed 565 (1845); *Clements v McCabe*, 210 Mich 207; 177 NW 722 (1920). Const 1963, art 4, § 51, imposes on the Legislature a broad directive to enact laws to protect the public health, safety, and welfare:

> The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health.

The police power authority is wide-ranging – the United States Supreme Court has described it as "one of the most essential powers of government, one that is the least limitable." *Hadacheck v Sebastian*, 239 US 394, 410; 36 S Ct 143; 60 L Ed 348 (1915). *See also, People v Brazee*, 183 Mich 259; 149 NW 1053 (1914). As one example of the exercise of this authority in

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[1] Nestle apparently purported to purchase a "subsurface and water rights deed" from the overlying owner and also purchased a lease of the surface for a period of 99 years. (Appellant's Brief of Nestle Waters North America Inc. at 5.) MCWC argued at trial that the surface owners, Defendants Bollmans, could not convey the right to extract groundwater separately from ownership of the overlying land. Opinion Following Bench Trial (Judgment/Order) (November 25, 2003) at 41. The Circuit Court denied the motion in its opinion. Because MCWC did not appeal that ruling that issue is not before the Court. However, it is clear under Michigan law that there can be no title to groundwater separate from the usufruct granted overlying owners.

relation to water, numerous judicial decisions and opinions of the Attorney General have recognized the importance of a clean and ample supply of water to the preservation of the public health and welfare. *Columbus v Mercantile Trust & Deposit Co*, 218 US 645; 31 S Ct 105; 54 L Ed 1193 (1910); *Hudson County Water Co v McCarter*, 209 US 349; 28 S Ct 529; 52 L Ed 828 (1908), quoted in *Obrecht v Nat'l Gypsum Co*, 361 Mich 399; 105 NW2d 143 (1960); *Palmer Park Theater Co v Highland Park*, 362 Mich 326; 106 NW2d 845 (1961); *Attorney General ex rel Wyoming Twp v Grand Rapids*, 175 Mich 503; 141 NW 890 (1913); OAG, 1959-1960, No 3327, p 154 (August 5, 1959); OAG, 2001-2002, No 7117, p 115 (September 11, 2002).

The second source is the constitutional recognition of the "paramount public concern" with the natural resources of the State, and the obligation of the Legislature to protect these resources. Const 1963, art 4, § 52, provides:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

This constitutional provision imposes a duty on the Legislature to protect the water and other natural resources from pollution, impairment, and destruction. See OAG, 1969-1970, No 4590, p 17, 19-27 (January 27, 1969) (discussing the debates of the Constitutional Convention of 1961 relative to the mandatory character of art 4, § 52). The former Michigan Environmental Protection Act, now Part 17 of the NREPA, MCL 324.1701 *et seq*, was passed in response to this mandate. *See Ray v Mason County Drain Comm'r*, 393 Mich 294, 304; 224 NW2d 883 (1975). ("Michigan's Environmental Protection Act marks the Legislature's response to our constitutional commitment to the "conservation and development of the natural resources of the state * * *.") That statute invokes the "public trust" in the natural resources of the State. *See, e.g.*, MCL

324.1701 (providing for "protection of the air, water, and other natural resources and *the public trust in these resources* from pollution, impairment, or destruction.").

Finally, the common law Public Trust Doctrine imposes an obligation to protect and conserve the navigable waters of the State on behalf of the public. The Public Trust Doctrine emanates from the ancient doctrine that navigable waterways are public highways that should be held in trust for the people, and that the sovereign has a duty to preserve these waterways for the benefit of the people. Under this doctrine, the State and its Legislature have not only the authority, but an affirmative obligation to protect the public interest in navigable waters. *Illinois Central Ry Co v Illinois*, 146 US 387; 13 S Ct 110; 36 L Ed 1018 (1892); *Nedtweg v Wallace*, 237 Mich 14, 17-20; 208 NW 51 (1927); *Collins v Gerhardt*, 237 Mich 38; 211 NW 115 (1926); OAG, 1961-1962, No 4040, p 381 (May 7, 1962).

Pursuant to these sources of authority, and reflecting the paramount public interest in water resources, the Legislature has enacted numerous laws that regulate the waters of our State for the benefit of the public, including the preservation and protection of water for domestic use, navigation, recreation, aesthetics, fishing, agriculture, commerce, and industry. *See, e.g.*, Part 31, Water Resources Protection, of the NREPA, 1994 PA 451, MCL 324.3101 *et seq*, and Part 301, Inland Lakes and Streams, of the NREPA, MCL 324.30101 *et seq*; and Part 127 of the Public Health Code, Water Supply and Sewer Systems, 1978 PA 368, MCL 333.12701 *et seq*, and the Safe Drinking Water Act, 1976 PA 399, MCL 325.1001 *et seq*. *See also*, OAG 2004, No 7162, *supra*, for additional statutory authority.

As will be more fully discussed below, Part 301 is the primary statute through which the State protects inland lakes and streams. It comprehensively regulates activities impacting inland

lakes or streams, including requiring a permit for activities that "enlarge or diminish an inland lake or stream."

C. Part 301 of the NREPA requires a permit to enlarge or diminish an inland lake or stream. DEQ recognizes that its interpretation of the administrative rule defining this phrase is inconsistent with the unambiguous terms "enlarge or diminish" in the statute.

1. Background on Part 301 of the NREPA, its administrative rules, and DEQ's interpretation of the statute and regulations.

The substantive provisions of Part 301 of the NREPA have remained essentially unchanged since the amendments that created the modern version of the statute in 1972 – the former Inland Lakes and Streams Act (ILSA), 1972 PA 346, MCL 281.951 *et seq*. The purpose of ILSA was broadly stated as:

> AN ACT to regulate inland lakes and streams; to protect riparian rights and the public trust in inland lakes and streams; to prescribe powers and duties; to provide remedies and penalties; and to repeal certain acts and parts of acts. [1972 PA 346.]

The definition of "inland lake or stream" is unchanged from the original act (former MCL 281.951(f)) and covers all inland lakes and streams over five acres in size. *See now*, § 30101(f) of Part 301, MCL 324.30101(f).

The provision at issue here, § 30102 of Part 301, is substantively unchanged from the original section (former MCL 281.953) and prohibits certain acts:

> Except as provided in this part, a person without a permit from the department shall not do any of the following:
>
> (a) Dredge or fill bottomland.
>
> (b) Construct, enlarge, extend, remove, or place a structure on bottomland.
>
> (c) Erect, maintain, or operate a marina.
>
> (d) Create, enlarge, or diminish an inland lake or stream.
>
> (e) Structurally interfere with the natural flow of an inland lake or stream.
>
> (f) Construct, dredge, commence, extend, or enlarge an artificial canal, channel, ditch, lagoon, pond, lake, or similar waterway where the purpose is ultimate connection with an existing inland lake or stream, or where any part of

the artificial waterway is located within 500 feet of the ordinary high-water mark of an existing inland lake or stream.

(g) Connect any natural or artificially constructed waterway, canal, channel, ditch, lagoon, pond, lake, or similar water with an existing inland lake or stream for navigation or any other purpose.

The permitting criteria are also unchanged from the original act (former MCL 281.957) and are now contained in § 30106 of Part 301:

> The department shall issue a permit if it finds that the structure or project will not adversely affect the public trust or riparian rights. In passing upon an application, the department shall consider the possible effects of the proposed action upon the inland lake or stream and upon waters from which or into which its waters flow and the uses of all such waters, including uses for recreation, fish and wildlife, aesthetics, local government, agriculture, commerce, and industry. The department shall not grant a permit if the proposed project or structure will unlawfully impair or destroy any of the waters or other natural resources of the state. This part does not modify the rights and responsibilities of any riparian owner to the use of his or her riparian water. A permit shall specify that a project completed in accordance with this part shall not cause unlawful pollution as defined by part 31.

The administrative rules promulgated under the former ILSA did not define "enlarge or diminish." *See* 1979 AACS 281.811-843; 1982 AACS R 281.811-843. In 1985 the administrative rules were amended. The proposed amendments initially did not include a definition of "enlarge or diminish an inland lake or stream". The second version of the proposed amendments, approved by the Natural Resources Commission and published in the Michigan Register, included a definition of "enlarge or diminish an inland lake or stream" as follows:

> (1)(e) "Enlarge or diminish an inland lake or stream" means, *but is not limited to*, the dredging or filling of bottomlands, or the dredging of adjacent shorelands, to increase or decrease a body of water's surface area or storage capacity, the placement of fill or structures or the manipulation, operation, or removal of structures or fill to increase or decrease water levels in a lake, stream, or impoundment. [May 5, 1985 Draft.]

After public notice and public comment, and review by the former Joint Committee on Administrative Rules and the Attorney General, however, the definition in the final version of the rules later approved by the Natural Resources Commission was identical except it excluded the phrase, "but is not limited to":

> (1)(e) "Enlarge or diminish an inland lake or stream" means the dredging or filling of bottomlands, or the dredging of adjacent shorelands, to increase or decrease a body of water's surface area or storage capacity or the placement of fill or structures, or the manipulation, operation, or removal of fill or structures, to increase or decrease water levels in a lake, stream, or impoundment. [September 19, 1985 Draft, attached as Appendix 2.]

The administrative record contains no explanation for this change and the definition was promulgated as quoted above and remains the definition today. The effect of deleting the phrase "but is not limited to" was to limit regulated increases or decreases in water levels to those effected through the specifically described acts. Subsequent to promulgation of Rule 1(e), the Department of Natural Resources, and later DEQ, implemented § 30102(d) as reflected in the DEQ decision document concerning Nestle's permit application. August 8, 2001 Response to Public Comments Document, Defendant's Ex Dn. That document stated at p 13:

> Thus, Part 301 does not regulate potential changes in water level or water volume of an inland lake or stream unless caused by dredging, filling, or manipulation of structures on bottomlands.

That statement reflects DEQ's historical interpretation of the terms "enlarge or diminish," through Rule 1(e), to require that dredging take place or that fill or a structure be placed on bottomlands before regulating the enlargement or diminishment of a lake or stream.

Consistent with that interpretation, without evaluating potential decreases in lake or stream levels, DEQ did not require permits because the wells at issue were not on bottomlands of an inland lake or stream. As discussed below, this interpretation is not consistent with the plain

language of the statute. DEQ recognizes this error and has begun the process of review and evaluation of potential amendments to its administrative rules.

2. The Circuit Court correctly applied the rules of statutory construction in determining that DEQ's administrative rule definition of "enlarge or diminish an inland lake or stream" was not consistent with Part 301 and that an activity that diminishes, as that term is commonly understood, an inland lake or stream, is regulated.

In 2000-2001, DEQ reviewed and permitted the groundwater extraction wells involved in the present case pursuant to the Safe Drinking Water Act. That review and approval required DEQ to, *inter alia*, evaluate the proposed extraction system for purposes of ensuring that the water to be produced met drinking water standards and that it would not adversely impact other parties using the aquifer for drinking water. DEQ ultimately determined that the wells could be approved under the Safe Drinking Water Act and that determination is not at issue in the underlying case. August 8, 2001, Response to Public Comments Document, Defendant's Ex Dn.

But DEQ declined to exercise regulatory authority over the wells under Part 301 of the NREPA. MCL 324.30102(d). As noted, DEQ's decision to decline jurisdiction under Part 301 was not based on a factual determination that the operation of Nestle's groundwater extraction wells would not have the potential to diminish regulated inland lakes and streams, but instead upon the agency's interpretation of what constitutes "diminish[ment]" of an inland lake or stream through Rule 1(e) of the Part 301 administrative rules.

The statutory provision at issue is short and straightforward. Section 30102(d) of Part 301 provides:

> Except as provided in this part, a person without a permit from the department shall not do any of the following:
>
> * * *
>
> (d) Create, enlarge, or diminish an inland lake or stream.

The fundamental goal of statutory construction is to discern legislative intent and the first, and potentially dispositive, step in determining that intent is to review the language. *In Re MCI*, 460 Mich 396, 411; 596 NW2d 164 (1999). This Court in *Manske*, 265 Mich App at 458, recently enumerated rules of statutory construction relevant in this matter:

> The primary goal of statutory interpretation is to give effect to the intent of the legislature. The intent of the Legislature is discerned from the plain language of the statute. If the statute is unambiguous, this Court presumes that the Legislature intended the meaning plainly expressed, and further judicial construction is neither permitted nor required. Where a plain reading of a statute yields more than one reasonable meaning, judicial interpretation is appropriate. If a term is not defined by the statute, it is appropriate to consult a dictionary for definitions of statutory terms. [Citations omitted.]

In construing the same section of Part 301 at issue here, § 30102(d), this Court applied these rules in determining that the term "enlarge," which is not defined by the statute, should be given its ordinary meaning as found in a dictionary. *Keisel Intercounty Drain Drainage District v Dep't of Natural Resources*, 227 Mich App 327, 336-339; 575 NW2d 791 (1998). Applying this same analysis in the instant case – Part 301 also does not define the term "diminish" – it is appropriate to consult a dictionary for the meaning of the term. *The American Heritage College Dictionary*, Third Edition, p 390 (2000), defines "diminish," in pertinent part, to mean "[t]o make smaller or less or to cause to appear so." The same dictionary defines "small" as "[b]eing below the average in size or magnitude" and "less" as "[n]ot as great in amount or quantity." *Id.* at 1284, 778.

According to the plain meaning of these terms, any activity that causes an inland lake or stream to fall below its average size or magnitude or reduces it in amount or quantity will "diminish" an inland lake or stream and require a permit under Part 301. Thus, according to the plain meaning, to "diminish" an inland lake or stream means to engage in an activity that reduces the level or volume of that water body, and a person cannot do so without a permit under Part

301. Moreover, "[a] necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2000) (citation omitted). Contrary to DEQ's historical interpretation, the language of the statute contains no limitations on the type or location of the activity that diminishes an inland lake or stream.

Finally, this construction is also supported by additional rules of statutory construction: Statutory provisions should be read in context and harmonized with other provisions, and statutory language should not be rendered surplusage. *See, e.g., Kelsel*, 227 Mich App at 334, 337. Dredging, filling, and the placement of structures are already regulated by different provisions of § 30102. MCL 324.30102(a) ("Dredge or fill bottomland"); (b) (Construct . . . or place a structure on bottomland"); and (e) ("Structurally interfere with the natural flow of an inland lake or stream"). Reading § 30102 as whole, the existence of these other provisions demonstrates the intent that subsection (d) cover different activities. Further, as dredging, filling, and the placement of structures are already regulated under §§ 30102(a), (b), and (e), if "enlarge or diminish" were limited to circumstances where those activities are taking place, it would be unnecessary and surplusage.

In light of the plain meaning of the term "diminish" in Part 301, DEQ's interpretation of that term through Rule 1(e) – only regulating diminishment of an inland lake or stream through the placement of fill or manipulation of structures on the bottomland of an inland lake or stream – is contrary to the statute. Although an administrative agency's interpretation of a statute is entitled to due deference, such deference is not provided where the language is plain and unambiguous. *Romulus v Dep't of Environmental Quality*, 260 Mich App 54, 65-66; 678 NW2d

444 (2003). Moreover, it is obviously of some significance in this case that the agency itself no longer supports its historical interpretation.

The Circuit Court correctly analyzed the question of the extent of Part 301 jurisdiction under § 30102(d). The plain language of the section requires a permit if an activity will diminish the volume or level of an inland lake or stream.

3. DEQ has begun the process of amending its administrative rules to conform to the proper interpretation of Part 301.

Prior to the trial and decision in this matter, DEQ had been internally reviewing its position on the scope of § 30102(d). The underlying matter, as well as additional situations where lake or stream levels were being increased or decreased, but without dredging or placing fill or structures on bottomland, had led the agency to critically evaluate its position. Recognizing the significance of its potential shift in interpretation and the complicated nature of this issue, DEQ has engaged in a deliberate process of reviewing and evaluating potential amendments to the Part 301 administrative rules.[2]

The difficulty in evaluating impacts to surface water bodies from groundwater withdrawals is demonstrated by the Circuit Court's understandable struggle with the technical and factual issues before it. As indicated by the evidence presented by the parties, there are a number of factors that can influence the level or volume of a lake or stream. Fluctuations in levels or volumes of lakes and streams occur seasonally and are overlain by longer-term fluctuations due to longer-term climatic changes. Water bodies are not uniformly influenced by precipitation and/or groundwater and retain and discharge water at differing rates. Finally, there

[2] In the interim, DEQ is eschewing reliance on Rule 1(e) and applying § 30102(d), as written, to new activities that clearly increase or decrease the levels of inland lakes and streams. For example, permits are being required for lake augmentation wells, where groundwater is pumped into lakes to increase the lake level above the ordinary high water mark, even though the outlets are placed above bottomlands.

are technical questions related to the best method and accuracy of the measurement and analysis of data, including, for example, the use of computer modeling.

DEQ's rule amendments will define "enlarge or diminish" to be consistent with the plain meaning of those terms – any activity that demonstrably increases or decreases the level or volume of an inland lake or stream will undergo regulatory review. Developing this regulatory approach may include some effort to exclude certain *de minimus* activities, for example residential drinking water wells and other domestic uses. Further, the DEQ may utilize its authority under § 30106(5) of Part 301 to create "minor project categories," allowing streamlined permitting for activities that are "similar in nature and have minimal adverse environmental impact." MCL 324.30105(6). Finally, through rule or guidance DEQ hopes to eventually memorialize appropriate methodologies for measuring the impacts of various activities, like groundwater withdrawals.

II. Both riparians and owners of property above groundwater have a qualified right in the use of water. When there is a conflict between surface uses by riparians and groundwater uses by owners, that conflict should be evaluated using a reasonableness test that balances the competing interests involved.

In addition to the question of regulatory authority over Nestle's activities, this case raises the important question of how to resolve a conflict between two qualified rights to use water: the right of an overlying owner to use groundwater and the right of a riparian owner to use surface water. This is a question of first impression in Michigan. While disputes between groundwater users and disputes between surface water users were treated very differently in early American decisions, Michigan courts have over time turned to a balancing test for both types of disputes. This test balances a number of factors to weigh the competing interests of the users, including the purpose and nature of the use, the harm caused by the use, the benefit of the use, the

existence of other uses, and the condition of the water body. Domestic uses, or traditional uses on the land, are given preference as against other uses.

Because groundwater and surface water are part of one large water system, this balancing test should also be applied to conflicts between riparian uses and groundwater uses. Such a result is consistent with scientific understanding of the connections between groundwater and surface water. While the Restatement Torts, 2d rule on conflicts between riparian uses and groundwater uses is helpful to the extent it also prescribes a balancing test, the Restatement is not controlling. The Court should look to the factors already discussed in previous cases to weigh the competing interests in this matter.

A. Standard of Review

The appropriate common-law standard to apply to conflicts between an overlying property owner's use of groundwater and a riparian owner's use of surface water is a question of law that is reviewed *de novo*. See *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991); *Moning v Alfono*, 400 Mich 425, 436; 254 NW2d 759 (1977) (reasoning that because the common-law of negligence was created by judges, the courts must decide the common-law rule).

B. Michigan courts have long recognized that riparian owners have a right to use the adjacent water that is qualified by other uses of the water.

As previously discussed, a riparian owner, whose property adjoins a watercourse, has a qualified right to use the water. Because a riparian owner does not have absolute ownership of water, the right of use is qualified by other uses. Michigan has adopted the "reasonable-use" rule for conflicts between riparian owners. *Hoover v Crane*, 362 Mich 36, 40; 106 NW2d 563 (1960). The riparian's use of a watercourse may not unreasonably interfere with other riparians' uses of the same watercourse. *Id.* This rule is a flexible doctrine, and the reasonableness of a

particular use depends on the facts of the case. *Id.* The Court considers factors such as "what the use is for, its extent, duration, necessity, and its application; the nature and size of the stream, and the several uses to which it is put; the extent of the injury to the one proprietor and of the benefit to the other." *Id.* Uses for "natural purposes" – those uses "absolutely necessary for the existence of the riparian proprietor and his family, such as to quench thirst and for household purpose" – are preferred over other uses. *Thompson v Enz*, 379 Mich 667, 686; 154 NW2d 473 (1967).

Michigan early on disavowed the "natural flow" rule followed by some English and American courts. This rule focuses on the effects of a riparian's use on the natural flow of the watercourse. In the rule's most draconian form, a use is unreasonable if it diminishes the quantity of the water flow or alters the quality of the water, regardless of the injury to the downstream riparian. A. Dan Tarlock, *Law of Water Rights and Resources*, § 3:55. In 1874, Justice Cooley recognized that such a rule effectively gives a monopoly on the stream's uses to the last downstream proprietor. *Dumont v Kellogg*, 29 Mich 420, 423 (1874). While the upper proprietors are very limited in their use because they cannot impair the natural state of the water source, the last proprietor downstream can do so with impunity. *Id.* Justice Cooley made clear that Michigan follows a reasonableness rule, not a natural flow rule:

> It is therefore not a diminution in the quantity of the water alone, or an alteration in its flow, or either or both of these circumstances combined with injury, that will give a right of action, if in view of all the circumstances, and having regard to equality of right in others, that which has been done and which causes the injury is not unreasonable. In other words, the injury that is incidental to a reasonable enjoyment of the common right can demand no redress. [*Id.* at 425.]

C. Over time, Michigan courts have also recognized that owners of property overlying groundwater have a right to use the water qualified by other uses.

Like a surface riparian, in Michigan an owner of property overlying groundwater also has a usufruct in the water that is qualified by other groundwater uses. The property owner may not unreasonably interfere with another property owner's use of groundwater. Although it has not always been clear how Michigan courts determine whether a use is reasonable, the most recent decision to consider the issue applied a balancing test similar to the riparian reasonable-use doctrine. *Maerz v United States Steel Corp*, 116 Mich App 710; 323 NW2d 524 (1982). Place of use is only one of many factors to consider when determining reasonableness. *Id.* at 720.

Michigan decisions on groundwater conflicts can only be understood against the evolving rules of liability used by American courts. Most courts began by applying the English rule, a per se rule that allows overlying owners to use groundwater regardless of injury to other users. Many courts found the rule too draconian, however, and modified it over time to allow liability in certain cases but not in others. This trend culminated in the Restatement Torts, 2d rule. The Restatement rule rejects per se rules of liability in favor of a balancing test.

1. The trend in American decisions has been to resolve conflicts over groundwater by weighing the competing interests of the users.

At early common law, American courts used the English rule to resolve groundwater conflicts. The per se rule treats groundwater as part of the subsurface, like soil or minerals, and thus gives the overlying proprietor absolute ownership of the water. The English rule is founded upon "the principle which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property." *Acton v Blundell*, 12 Mees & W 324; 152 Eng Rep 1223 (1843). Thus, a "person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure." *Id.* In reality, the English rule operates

as a rule of capture. A proprietor can extract as much groundwater as he wants even if that use takes water below the property of adjacent owners.

Many American courts recognized the unfairness of the English rule and modified it to allow certain exceptions for other groundwater users. Some courts, while continuing to profess adherence to the English rule, allowed an exception for malicious acts. *E.g.*, *Gagnon v French Lick Springs Hotel Co*, 163 Ind 687; 72 NE 849 (1904). Others applied riparian law to uses of groundwater by characterizing the water as an "underground stream" rather than as "percolating waters." *Henderson v Wade Sand & Gravel Co*, 388 So 2d 900, 901 (Ala, 1980). In New York, an early decision avoided the consequences of the English rule by applying the State's riparian doctrine to groundwater pumping that dried up surface waters. *Smith v Brooklyn*, 18 AD 340; 46 NYS 141 (NY App Div, 1897), *aff'd* 160 NY 357; 54 NE 787 (1899).

In the late nineteenth and early twentieth centuries, most common law states adopted a modification of the English rule, known as the American rule. Although sometimes denominated as the "rule of reasonable use," the American rule does not balance competing interests as the riparian reasonable-use doctrine does. Instead, the American rule divides the uses of groundwater into uses on or in connection with the overlying land, and all other uses. Tarlock, *supra* at § 4:9. A use on or in connection with the overlying land, even if it causes harm to other users, is per se reasonable as long as it is for a beneficial purpose. *Id.* But any other use that causes harm is per se unreasonable. *Id.* In effect, the American rule narrows the absolute dominion over groundwater granted by the English rule to only those uses on or in connection with the overlying land.

Some states adopted a correlative rights rule that combined elements of the riparian balancing test with the place of use restriction found in the American rule. The correlative rights

rule originated in the landmark California case of *Katz v Walkinshaw*, 141 Cal 116; 74 P 766 (1903). As explained in *Katz*, all owners have the right to a "fair and just proportion" of a common groundwater supply "as may be necessary for some useful purpose in connection with the land from which it is taken." *Id.* at 134, 136. Unlike the American rule, that does not limit uses on the land even if they harm others who are also using water on their land, the correlative rights rule subjects competing uses on overlying lands to a riparian-like rule of reasonable use. *Id.* at 136. Owners that use groundwater on overlying lands have paramount rights as against those who wish to use the water for other purposes, such as to transport the water to lands outside the basin. *Id.* at 135. Only if there is a surplus of water that is not needed by those with paramount rights may groundwater be used for purposes not in connection with the overlying land. *Id.* at 135-136.

More recently, the Restatement Torts, 2d rule combines the American rule and the correlative rights rule by imposing liability for withdrawals that unreasonably cause harm through lowering of the water table or that exceed a reasonable share of the common groundwater supply. 4 Restatement Torts, 2d, § 858(1)(a)-(b), p 258. Reasonableness is to be determined by weighing riparian factors. *Id.* at § 858(2). Unlike the American or correlative rights rules, however, the Restatement does not give automatic protection to uses on overlying lands as against other uses. This exception to liability is too broad, the Restatement explains, because it protects uses for domestic purposes, as well as large withdrawals by an overlying industrial plant or apartment house. *Id.* at § 858, cmt(e). Applying reasonableness factors ensures that the "salient factor is not the place of the use but the withdrawal of water in unprecedented quantities for purposes not common to the locality." *Id.*

2. While Michigan case law has not always been clear, Maerz applied a reasonableness balancing test similar to the riparian reasonable use doctrine.

In 1917, Michigan joined other States in rejecting the harsh nature of the English rule. In *Schenk v Ann Arbor*, 196 Mich 75; 163 NW 109 (1917), the City of Ann Arbor purchased land three miles away from the city to supplement its municipal water supply. *Id.* at 76-78. The city first conducted test pumping to determine how much water was available from the wells. *Id.* at 77-78. Because the tests were successful, the city planned to build a pumping station and pipe the water to the city. *Id.* at 78. Nearby farmers, whose wells had been affected by the test pumping, asked the Court for damages and an injunction to halt the city's plan. *Id.* at 79-80.

Recognizing that the English rule would leave the farmers with no remedy, the Court reviewed cases from other States that discussed various modifications to the rule. One such decision was *Meeker v East Orange*, 77 NJL 623; 74 A 379 (1909), in which the New Jersey Court adopted the "rule of reasonable user." *Schenk* quotes extensively from *Meeker*. While commentators assumed that the "rule of reasonable user" adopted by *Meeker* was the American rule, New Jersey later interpreted *Meeker* as a correlative rights decision in *Woodsum v Pemberton Twp*, 172 NJ Super 489; 412 A2d 1064 (1980), aff'd 177 NJ Super 639; 427 A2d 615 (1981).

After reviewing the exceptions to the English rule, the Court in *Schenk* determined that the city's use of groundwater was qualified by the "rule of reasonable user." *Schenk* at 91. The Court began its holding by noting that the city "proposes to use none, or at most only an inconsiderable, part of the water upon, or for the benefit of, the land from which it takes it, or for its own benefit as landowner." *Id.* at 81. In addition, the pumping clearly affected nearby wells. "Under such circumstances, the right of the landowner, to the injury or detriment of other

landowners, to take from his own land such percolating waters as he may thus be able to collect, is not an unqualified, but is a qualified, right." *Id.* at 81-82.

While *Schenk* is probably best understood as one of many cases across the United States that applied the American rule to hold municipalities liable for the effects of groundwater pumping, later Michigan decisions have not adhered to the bright line distinctions of the American rule. Instead, Michigan courts have evaluated the reasonableness of each use and weighed the benefits and costs of each to determine the extent of liability. The place of use, while an important factor, has not been determinative.

Five years after *Schenk*, the Supreme Court confronted another dispute over a municipality's use of groundwater. In *Bernard v St Louis*, 220 Mich 159; 189 NW 891 (1922), a city's use of groundwater for municipal purposes harmed a hotel's use of spring waters for its sanitarium. Under a strict application of the American or even the correlative rights rule, the city's use of water was unreasonable because it was not on or in connection with the overlying land. The Court, however, evaluated both uses and determined that there could be an adequate supply for both parties if the city limited its pumping and the hotel did not allow its spring water go to waste. *Id.* at 163. Therefore, the city was to compensate the hotel for its expenses in obtaining a supply of water, but only for a supply adequate for the hotel's reasonable use. *Id.* at 165. The hotel was directed to conserve water. *Id.*

Similarly, in *Hart v D'Agostini*, 7 Mich App 319; 151 NW2d 826 (1967), a well went dry after nearby water was pumped out of the ground for the construction of a sewer trunk line. Under the American rule, if the pumping was on or in connection with the overlying land and for a beneficial purpose, there could be no liability regardless of harm. While the Court of Appeals analyzed the purpose and place of use, it also weighed a number of factors, including the extent

of the harm to the well owners, the necessity of the use, and the benefit of sewer construction to the area. *Id.* at 323. Moreover, the Court made clear that no person has an absolute right to groundwater: "In our increasingly complex and crowded society, people of necessity interfere with each other to a greater or lesser extent. Subterranean water, which is no respecter of property lines, is often impossible to extract without water from adjoining lands percolating across the property line." *Id.* at 321. This rationale applies equally to all groundwater users, not just those who are affected by others' on-site uses.

Maerz, supra, confirmed that conflicting groundwater uses should be resolved using a riparian-like reasonableness balancing test. In *Maerz*, pumping from a limestone quarry caused a nearby water well to go dry. *Maerz* at 712. Relying on *Schenk*, the lower court applied the American rule and determined that the quarry's use of groundwater was per se reasonable because the use was on or connected to the overlying land and for a beneficial purpose. *Id.* at 712. In reversing the lower court, the Court of Appeals concluded that previous Michigan cases had not applied categorical rules to groundwater uses based on the location of use. *Id.* at 715-720.

Citing the Restatement rule with approval, the Court determined that the proper rule for groundwater disputes is a balancing of competing interests. Because the principles in the Restatement rule "are consistent with the Michigan adjudications on the subject and the general trend of decisions in other states, are less harsh and arbitrary and more fair and just than the English rule or lesser modifications of the English rule," *Maerz* held that these principles "should be followed in Michigan." *Id.* at 720. The Court specifically noted the rule's incorporation of riparian reasonableness factors such as "the economic and social value of the use, the extent and

amount of harm it causes, the practicability of avoiding the harm, and the justice of requiring the user causing the harm to bear the loss." *Id.* at 720, n 4.

Although *Maerz* rightly determined that Michigan has in practice applied a balancing rule to groundwater disputes, the Court erred in stating that Michigan follows the correlative rights rule. As an initial matter, such a conclusion requires a strained reading of *Schenk*. As discussed above, it appears much more likely that *Schenk* applied the American rule to find that the city's off-site use of water was unreasonable. Moreover, the Court in *Maerz* referred interchangeably to the correlative rights rule and the Restatement rule. The two differ – crucially – in how they treat the place of use of groundwater. While the correlative rights rule gives paramount rights to owners using groundwater on overlying lands as against those who use the water for other purposes, place of use is only one factor in the reasonableness test of the Restatement rule.

D. Conflicts between surface uses by riparians and groundwater uses by overlying owners should be evaluated using a balancing test.

The Circuit Court correctly recognized that conflicts between riparian uses and conflicts between groundwater uses are subject to a balancing test to determine reasonableness. Opinion at 47. But rather than extend that test to the dispute at bar, the Circuit Court fashioned a new rule that gives absolute protection to surface water uses when they are impacted by off-site groundwater uses:

> In cases where there is a groundwater use that is from a water source underground that is shown to have a hydrological connection to a surface water body to which riparian rights attach, the groundwater use is of inferior legal standing than the riparian rights. In such cases, as here, if the groundwater use is off-tract and/or out of the relevant watershed, that use cannot reduce the natural flow to the riparian body. [*Id.* at 48.]

This rule combines elements of the natural flow theory in riparian law with the per se place of use restriction in certain groundwater law. Both have been disavowed by courts in Michigan.

This Court should hold that the balancing test from both riparian disputes and groundwater disputes applies when there is a conflict between an overlying property owner's groundwater use and a riparian's surface water use. This test balances a number of factors to weigh the competing interests of the users, including the purpose and nature of the use, the harm caused by the use, the benefit of the use, the existence of other uses, and the condition of the water body. Domestic uses, or traditional uses on the land, are given preference as against other uses. Such a test would not only be consistent with the trend of previous decisions, it would recognize the scientific reality that groundwater and surface water are part of the same water system.

1. The Circuit Court's per se rule is not supported by Michigan case law, whether in the form of dicta or otherwise.

The Circuit Court acknowledged that "there is no controlling Michigan law directly on point to this case." *Id.* at 44. Of the four cases the Court found to be "the core of near-relevant case law in Michigan," the Court distinguished *Maerz* as a conflict between two groundwater users who were "*in pari materia* in relationship to the water." *Id.* at 44, 47. While *Maerz* is not directly on point because it concerns a conflict between groundwater users, the Court failed to recognize that the riparian owner and the owner of property overlying groundwater both have rights in the use of water. The Court instead relied on dicta from three cases: *Dumont*, *Schenk*, and *Hoover*. None of the cases, when read in context, support the Court's legal rule.

As discussed in Argument II.A, *supra*, *Dumont* is a seminal riparian rights case in which Justice Cooley held that riparian conflicts should be governed by a reasonable use rule, not a natural flow test. Rather than logically extending this holding to the case at bar, the Circuit Court focused on two situations that Justice Cooley stated were clearly unreasonable under riparian law. These situations are diversion of a stream so that a downstream proprietor is no

longer a riparian, and interference with a riparian's rights by a stranger. Opinion at 45 (quoting *Dumont, supra* at 422). Contrary to the implication in the Circuit Court's Opinion, neither exception applies to this case. A stream has not been diverted and turned away so as to destroy the riparian interests below. Moreover, a groundwater user such as Nestle is not a stranger, but a holder of a qualified right in the use of water assuming ownership of the overlying land.

In fact, *Dumont* supports applying a balancing test to the case at bar. Justice Cooley criticized the natural flow test because it would "give to the lower proprietor superior advantages over the upper, and in many cases give him in effect a monopoly of the stream." *Dumont* at 423. This reasoning is as applicable to the current dispute as to a dispute between riparians. In effect, the Circuit Court's natural flow rule gives riparian users a monopoly over the water system as if groundwater users did not exist.

The Circuit Court next relies on "important dicta" from *Schenk*: a quote from the New Jersey decision, *Meeker*. As discussed in Argument II.B, *supra*, *Meeker* adopted the "rule of reasonable user" for groundwater conflicts. The Court in *Schenk* quoted extensively from *Meeker* before determining that the city's groundwater use was qualified by the "rule of reasonable user." Part of the quote describes the effect of the rule: "['the rule of reasonable user] does prevent the withdrawal of underground waters for distribution or sale for uses not connected with any beneficial ownership or enjoyment of the land whence they are taken . . . if [the owner of adjacent or neighboring land's] wells, springs or streams are thereby materially diminished in flow."[11] *Schenk, supra* at 84 (quoting *Meeker, supra* at 638-639). MCWC also relies on a passage in *Schenk* discussing the holding of an early New York decision: "[In *Smith*] it was held that, whatever may be the rule with respect to the right of a landowner to use the water percolating through the earth, and thereby to affect the sources of wells or springs upon his

neighbor's land, he may not divert and diminish the natural flow of a surface stream by preventing its usual and natural supply. . . ." *Schenk* at 84-85.

These quoted passages are best understood as part of *Schenk's* survey of other States' exceptions to the English rule and not as implicit approval of the details of the exceptions themselves. *Schenk* only applied the "rule of reasonable user" to find the city liable for the effects of its pumping on other groundwater users. Moreover, Michigan explicitly disavowed the natural flow theory in *Dumont*, while courts in New Jersey and New York have continued to use natural flow language in their discussions of riparian rights. *See, e.g., Hackensack Water Co v Nyack*, 289 F Supp 671, 677-678 (SD NY 1968).[3] Thus, it is not surprising that New Jersey and New York decisions involving riparian uses would include such language, but it would have been a dramatic shift in Michigan law for the *Schenk* Court to adopt elements of a natural flow rule after *Dumont*.

Finally, the Circuit Court relies on dicta from *Hoover*, in which the Supreme Court applied the reasonable use doctrine to a dispute between two riparians. In determining that the use of water for irrigation was reasonable, the Court stated:

> Both resort use and agricultural use of the lake are entirely legitimate purposes. Neither serves to remove water from the watershed. There is, however, no doubt that the irrigation use does occasion some water loss due to increased evaporation and absorption. Indeed, extensive irrigation might constitute a threat to the very existence of the lake in which all riparian owners have a stake; and at some point the use of the water which causes loss must yield to the common good. [*Hoover* at 42.]

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[3] Connecticut also has continued to use natural flow language. *See, e.g., Adams v Greenwich Water Co*, 138 Conn 205; 85 A2d 177 (1951). This explains why the Court in *Colliens v New Canaan Water Co*, 155 Conn 477; 234 A2d 825 (1967), applied that State's riparian natural flow doctrine to find that a groundwater use that reduced the natural flow of the river was unreasonable.

Taken in context, this passage shows that the Supreme Court balanced the reasonableness of the two competing uses. Keeping water within the watershed is one factor that makes the use more reasonable, not the determinative factor. Water that remains within the watershed is more likely to return to the lake. Far from supporting a rigid distinction between on-site and off-site uses, this passage in *Hoover* acknowledges that irrigation may one day be considered unreasonable even though the use remains within the watershed.

2. A balancing test acknowledges the interconnected nature of groundwater and surface water in the larger water system.

Lack of scientific knowledge about the source and movement of groundwater was a primary reason for the disparate treatment of groundwater and surface water at early common law. While surface water could be followed as it flowed across property, groundwater was by nature hidden, and its movements appeared inexplicable. The science of hydrology has now advanced so that hydrologists can, with some reliability, map groundwater reservoirs and predict the flow of water. More importantly, hydrologists now know that groundwater and surface water are not distinct entities. Each is part of an interrelated water system; groundwater use may affect a surface water body, and surface water use may affect a groundwater reservoir. Thus, a balancing test would reflect the evolution of scientific knowledge in this area.

Early decisions premised the English rule of capture on the lack of knowledge concerning groundwater. In the 1843 English decision of *Acton v Blundell, supra*, the Court reasoned that groundwater "does not flow openly in the sight of the neighboring proprietor [as does surface water], but through the hidden veins of the earth, beneath its surface. No man can tell what changes these under-ground sources have undergone, in the progress of time." 12 Mees & W 350. Seven years later, the Connecticut Supreme Court contended that groundwater could not be subject to riparian law because it was such a mysterious substance:

> Water, whether moving or motionless in the earth, is not, in the eye of the law, distinct from the earth. The laws of its existence and progress, while there, are not uniform, and cannot be known or regulated. It rises to great heights, and moves collaterally, by influences beyond our apprehension. These influences are so secret, changeable and uncontrollable, we cannot subject them to the regulations of law, nor build upon them a system of rules, as has been done with streams upon the surface. [*Roath v Driscoll*, 20 Conn 533, 541 (1850).]

While groundwater systems are complex and hydrologists may differ in their conclusions, the science of hydrology is able to better explain those "influences" that seemed so "secret, changeable and uncontrollable" to the early courts. Hydrologists can now detect the presence of groundwater by drilling wells in different locations and marking the depth of the water table on contour maps. From these maps, the direction of groundwater flow can be predicted at a given time. As happened at trial, hydrologists can give expert testimony and use computer models to estimate the complexities of a constantly changing groundwater system.

Moreover, the science of hydrology has shown that surface water and groundwater are typically part of a unified hydrologic system. A surface water body may discharge water to a groundwater system, or the groundwater system may recharge a surface water body. Thus, any use of water has the potential to impact other water resources and the benefits those water resources provide. Rather than continue to maintain an artificial distinction between the two locations of water, this Court should adopt a balancing test that acknowledges the wider impacts of a water use. As demonstrated at trial, expert testimony can be used to estimate the effects of a given use on the water system.

Acknowledging the interconnections between groundwater and surface water in this way does not necessarily imply that uses of groundwater and surface water will be equally protected by the balancing test. Because in many instances surface water bodies provide benefits – such as wildlife and fish habitat and recreation – that water beneath the surface does not, riparian uses

may receive more protection. For example, when there is a conflict between riparian uses and groundwater uses, a court will weigh not only the purpose and nature of the competing uses, but the existence of other uses and the social and environmental benefits of the water body. Unlike the Circuit Court's per se test, however, a balancing test would not accord riparian uses an automatic preference as against groundwater uses.

3. The Restatement rule is helpful to the extent it reflects a balancing test already in use in Michigan, but it is not controlling.

The Restatement rule governing conflicts between groundwater users and riparian users is helpful because it prescribes a balancing test similar to the one used by Michigan courts to resolve conflicts between riparian uses and conflicts between groundwater uses. This Court should not adopt the rule as Michigan law, however, because the Restatement rule imposes an unnecessary threshold requirement of "direct and substantial effect" on the surface water body, when the extent and amount of harm should be one part of the balancing analysis.

The Restatement rule states:

> (1) A proprietor of land or his grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless
>
> * * *
>
> (c) the withdrawal of the ground water has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water. [Restatement Torts, 2d, § 858(1)(c).]

Liability is to be determined using riparian principles of reasonableness. *Id.* at § 858(2). The comments explain that the rule "restates the conditions for recognizing that ground water and surface water are often closely interrelated and should be treated as a single source." *Id.* at § 858, cmt(c). Rather than using "doubtful and unscientific categorizations," the rule is intended to substitute a "pragmatic test for determining the interconnection." *Id.*

Contrary to Nestle's claim, *Maerz* did not adopt the Restatement rule as Michigan law for conflicts between groundwater users. After reviewing Michigan decisions on groundwater conflicts, the Court found that the "principles expressed in [the Restatement rule] are consistent with the Michigan adjudications on the subject and the general trend of decisions in other states . . . and should be followed in Michigan." *Maerz* at 720. A fair reading of this sentence is that the Court treated the Restatement as a secondary source that could shed light on Michigan decisions, not as the primary source of law in Michigan for all groundwater conflicts.

Even if *Maerz* can be read to adopt the Restatement rule for conflicts between groundwater users, *Maerz* certainly did not adopt the rule governing conflicts between groundwater users and surface water users. At issue in *Maerz* was whether a groundwater use on or in connection to the overlying land was per se reasonable even though it harmed another's groundwater use. The Court reviewed past Michigan decisions on conflicts between groundwater users but did not discuss any riparian cases. In fact, when first discussing the Restatement rule, the Court quoted only what it labeled the "pertinent part" of section 858 – subsections (1)(a) and 1(b). *Id.* at 715, n 1. As noted above, the rule governing conflicts between groundwater users and surface water users is found in subsection (1)(c).

Although the portions of the Restatement rule addressed in *Maerz* are consistent with Michigan law, reflecting a true balancing test , the threshold requirement contained in subsection 1(c) – that there be a "direct and substantial effect upon a watercourse or lake" - appears to deviate from a balancing test by imposing an unclear and perhaps overly burdensome hurdle. The Restatement's additional requirement is peculiar because the "extent and amount of the harm" is one of the riparian principles balanced to determine the unreasonableness of the harm. Restatement Torts, 2d, §§ 858(2) and 850(A)(c). Thus, a groundwater use that otherwise

satisfies the balancing principles is not unreasonable unless it causes significant harm. See *id.* § 850(A), cmt(g). Rather than import another special requirement for these conflicts, the Court should rely on a balancing test to determine reasonableness. Any surface water user should still be required to introduce scientific evidence to show that a groundwater use is the cause of harm to a surface water use and the extent of harm to the surface water body.

The Court should hold that disputes between use of groundwater by overlying owners and use of surface water by riparians are governed by a reasonableness balancing test. In determining the reasonableness of a use, courts should be guided by the factors discussed in previous decisions on water use conflicts. These factors include the purpose and nature of the use, the harm caused by the use, the benefit of the use, the existence of other uses, and the condition of the water body. Domestic uses, or traditional uses on the land, are preferred. Because the Circuit Court only made factual findings regarding the extent and nature of the harm caused by the use, the matter should be remanded for the Court to make further findings with respect to the other factors and to apply the balancing test.

III. Under MEPA, courts must determine the standard of environmental quality to apply to the alleged harmful conduct. A court may adopt a standard from the statute if it contains a pollution control standard or if, after independent review, the court determines that the standard adequately protects the natural resource. Parts 301 and 303 provide relevant standards under either of these methods. In evaluating potential impacts to natural resources under MEPA, a "statewide" perspective is not required.

A. Standard of Review

Statutory interpretation of MEPA is a question of law that is reviewed *de novo*. *Preserve the Dunes*, *supra* at 508.

B. Courts are vested with the responsibility of developing a common law of environmental quality under MEPA. In evaluating whether the parties have met their respective burdens, courts must determine the appropriate standard to be applied to the facts of the case.

MEPA grants the public the right to bring actions against any person "for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction." MCL 324.1702(1). The courts are vested with "the important task of giving substance to the standard [of environmental quality] by developing a common law of environmental quality." *Ray v Mason County Drain Comm'r*, 393 Mich 294, 306; 224 NW2d 883 (1975). It is the court's responsibility to "fashion standards in the context of actual problems as they arise in individual cases and to take into consideration changes in technology which the Legislature at the time of the act's passage could not hope to foresee." *Id.* at 307.

MEPA claims are decided using a burden-shifting approach. First, the plaintiff must make a "prima facie showing that the conduct of the defendant has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources, or the public trust in these resources. . . ." MCL 324.1703(1). If a prima facie showing is made, then a defendant may rebut the plaintiff's showing with contrary evidence and may also show by affirmative defense that there is no feasible and prudent alternative to the conduct and the "conduct is consistent with the promotion of the public health, safety, and welfare in light of the State's paramount concern for the protection of its natural resources." *Id.*

General rules of evidence govern the establishment of a prima facie case and the defendant's rebuttal. MCL 324.1703(1); *Ray, supra* at 309. A prima facie case is one that is "sufficient to withstand a motion by the defendant that the judge direct a verdict in the defendant's favor." *Id.* at 309. The evidence necessary to meet this burden will vary depending on the nature of the alleged impairment to the natural resource. *Id.* A plaintiff need not establish

actual environmental degradation; probable damage to the environment is sufficient. *Id.* Once a prima facie showing is made, the burden of going forward with the evidence shifts to the defendant. *Id.* at 311. The defendant must put forth enough evidence to rebut plaintiff's showing. *Id.*

C. In light of the Supreme Court's decision in *Preserve the Dunes*, the Circuit Court should clarify its use of statutory standards. Assuming Parts 301 and 303 are appropriate standards of environmental quality in this case, the Circuit Court did not adequately support its burden-shifting analysis.

The Circuit Court, in large measure, followed the appropriate analytic framework and basic principles outlined above. But its analysis is inadequate in two respects: First, particularly in light of the subsequent Supreme Court opinion in *Preserve the Dunes, supra*, the Circuit Court's rationale for adopting Parts 301 and 303 as appropriate standards under MEPA should be clarified. Second, assuming Part 301 and 303 provide appropriate MEPA standards in this case, the Court failed to undertake an adequate analysis as required by *Ray, supra*, because it did not apply specific facts to support its decision that MCWC established a prima facie case. The Court also did not adequately support its conclusion that Nestle failed to rebut MCWC's prima facie case.[4]

The Court properly stated that its task was to "find[] or establish[] a standard or standards to measure Defendant's water-extraction activities against to determine if such actions result in the impairment of the natural resources involved in this case." Opinion at 54. The Court then stated that it would look to Parts 301 and 303 to determine whether the statutes had a relevant standard, and if so, would decide whether to adopt the standard. *Id.* at 54-55. In its discussion of the specific statutes, however, the Court did not explain how these statutes provided relevant

[4] The Circuit Court determined that Nestle failed to plead or present proofs regarding the availability of feasible and prudent alternatives. Opinion at 63-64. Nestle does not dispute this ruling in its brief.

standards but simply recited and applied the statutory requirements to determine whether a permit should have been granted by the DEQ. *Id.* at 55-60. The Court then found a prima facie showing on the basis that the conduct was subject to the permit requirements and a permit would not have been granted. *Id.*

Both Nestle and MCWC discuss the Supreme Court's decision in *Preserve the Dunes, supra*, a decision that addressed the utilization of statutory criteria as standards under MEPA but was not issued until after the Circuit Court's opinion. In *Preserve the Dunes* the Supreme Court discussed its prior decision in *Nemeth*. *Nemeth* held that if a court determines a pollution control standard is valid, applicable and reasonable, MCL 324.1701(2)(a), a party could make a prima facie case by showing that conduct would violate a statute containing a pollution standard. *Nemeth* at 35-36. Unfortunately, Nestle and MCWC provide little analysis and, in conclusory fashion, simply assert that *Preserve the Dunes* supports their respective positions.

At issue in *Preserve the Dunes* was whether a violation of a permit eligibility requirement of Part 637, Sand Dune Mining, of the NREPA, MCL 324.63701 *et seq*, specifically a "grandfathering" provision – could establish a prima facie case under MEPA. The Supreme Court determined on two separate – but interrelated – grounds that such a violation could not meet plaintiff's burden. First, the Supreme Court reasoned that Part 637 did not contain a pollution control standard, and thus a violation of the statute did not establish a prima facie case as did a violation of the former Soil Erosion and Sedimentation Control Act[5] in *Nemeth*. *Id.* at 516-517. In the course of this determination, the Court indicated that the prima facie "rule" established in *Nemeth* was based solely on §1701(2) of MEPA, and, because that provision only refers to "a standard for pollution," *Nemeth* was limited to statutes containing pollution control

[5] Now Part 91, Soil Erosion and Sedimentation Control, of the NREPA, MCL 324.9101 *et seq*.

standards. *Id.* at 516. Second, the Supreme Court reasoned that MEPA is concerned only with conduct that harms the environment, not with improper administrative decisions. *Id.* at 518-519. A violation of permit eligibility requirements is unrelated to whether mining will harm the environment. *Id.*

The Court in *Preserve the Dunes* read *Nemeth*'s prima facie rule as limited to statutes containing pollution control standards and, therefore, found the rule inapplicable to the statute and circumstance before the Court. But, contrary to Nestle's argument, *Preserve the Dunes* does not foreclose the possibility that Parts 301 and 303 contain pollution control standards under *Nemeth*. Like the soil erosion statute at issue in that case, both Parts 301 and 303 are primarily directed to protection of water quality and aquatic resources. For example, one of the identified benefits provided by wetlands is "pollution treatment by serving as a biological and chemical oxidation basin." MCL 324.30302(1)(b)(iv).

Moreover, neither *Nemeth* nor *Preserve the Dunes* purport to otherwise bar the use of statutory standards in defining a standard of environmental protection under MEPA. A court may then use this standard to determine whether plaintiff has made a prima facie showing of impairment. Indeed, there is nothing in *Nemeth* or *Preserve the Dunes* that would preclude a court from deciding that the substantive standards of an environmental protection statute, en toto, should be the environmental standard in a given case. It is entirely logical and appropriate for a court to adopt substantive statutory standards if, after independent review, the court finds them helpful.

Thus, even assuming a violation of Part 301 or Part 303 does not automatically establish a prima facie case, the Circuit Court could adopt the substantive standards of these Parts as the standard to be applied to the withdrawals at issue in this case. Unlike the permit eligibility

requirements at issue in *Preserve the Dunes*, substantive permitting criteria in Parts 301 and 303 measure environmental harm – in fact, the agency is directed to use the criteria to determine whether the proposed conduct harms the natural resource.

Substantive permitting criteria can be found in § 6 of Part 301 and § 11 of Part 303. Under Part 301, the DEQ must evaluate the "possible effects of the proposed action upon the inland lake or stream and upon waters from which or into which its waters flow and the uses of all such waters" in determining whether to grant a permit. MCL 324.30106. The DEQ may not grant a permit if the project "will unlawfully impair or destroy any of the waters or natural resources of the state." *Id.*

Part 303 provides even more specific guidance, directing the DEQ to consider several criteria in determining whether the activity is in the public interest, including the "probable impact of each proposal in relation to the cumulative effect created by other existing and anticipated activities in the watershed," "the size of the wetland being considered," and "[p]roximity to any waterway." MCL 324.30311(2)(d), (f), and (h). In addition, a permit cannot be issued if there will be an unacceptable disruption to aquatic resources. MCL 324.30311(4). This determination is based on consideration of the public interest criteria discussed above, as well as the legislative findings contained in § 30302. As noted, among the values provided by wetlands are pollution control.

Accordingly, there are at least two ways a court could use Parts 301 and 303 in undertaking a MEPA analysis. The statutes could be determined to contain relevant and applicable pollution standards and, therefore, a violation of the statutes would be a prima facie showing under *Nemeth*. Or, some or all of the substantive statutory standards could be used by the court in defining an appropriate standard by which to measure environmental harm. The

Circuit Court appeared to simply assume that it could adopt Parts 301 and 303 as MEPA standards. In light of *Preserve the Dunes*, further analysis is required to explain why Parts 301 and 303 are appropriate standards in this case.

Neither *Nemeth* nor *Preserve the Dunes* allow a violation of a statute to be used as a per se violation of MEPA. Once a prima facie showing has been made, the defendant still has the opportunity to rebut by showing that regardless of the violation, there is no actual or likely pollution, impairment or destruction. *Nemeth* at 36, n 10. The defendant may also rebut the case by showing there is no feasible and prudent alternative to the conduct. *Id.*

Contrary to Nestle's contention,[6] the Circuit Court did not find a per se violation of MEPA based on violations of Parts 301 and 303. After determining that a permit could not be granted for the groundwater withdrawals under Part 301, the Court concluded: "Such finding sets out a prima facie case under MEPA that the Defendants have not rebutted, as spelled out in great detail in the factual-analysis portions of this opinion above. . . . Thus, the Defendants are in violation of the standard adopted herein, thus making them subject to appropriate remedies being ordered by this Court in this case." Opinion at 58. Similarly, after finding that a permit could not be granted for the withdrawals under Part 303, the Court concluded: "Plaintiffs are hereby found to have presented a prima facie case under MEPA using this WPA standard. It is also found that the Defendants have not rebutted this prima facie case as discussed in detail in the factual-analysis portions of this opinion above." *Id.* at 60.

Assuming that Parts 301 and 303 can be used as appropriate standards, the Circuit Court's findings are inadequate under *Ray*, *supra*. Although the Court cited the statutory criteria and referred to its prior factual determinations in holding that MCWC established a prima facie

[6] Appellant's Brief of Nestle Waters North America Inc. at 43.

showing, the Court did not apply specific facts to each of the criteria. The Court also did not explain how its earlier factual findings supported its conclusion that Nestle did not meet its burden on rebuttal. "The judicial development of a common law of environmental quality, as envisioned by the Legislature, can only take place if circuit court judges take care to set out with specificity the factual findings upon which they base their ultimate conclusions." *Ray*, *supra* at 307. A reference to the "factual-analysis portions of this opinion" is not enough to aid this Court in its review, or to aid future courts in the "judicial development of a common law of environmental quality." *Id.*[7]

Therefore, the MEPA claim should be remanded to the Circuit Court to clarify its rationale for adopting Parts 301 and 303 as appropriate standards. In addition, the Circuit Court should make specific findings to support its conclusion that MCWC made a prima facie showing and that Nestle failed to rebut the showing.

D. The standard of environmental quality should take into account the specific characteristics of the resource affected by the conduct. While a statewide perspective on impairment may be relevant in some circumstances, it is not required. The wetlands and streams in this case have distinct benefits to the local environment that are appropriately considered in determining whether Nestle's conduct violated MEPA.

The standard of environmental quality to be applied in any given case is flexible and determined by the specific facts. *Nemeth*, *supra* at 37; *Ray*, *supra* at 307. Nestle suggests that a "statewide" perspective must be used in evaluating potential impairment of natural resources under MEPA. Reply Brief of Nestle Waters North America Inc. at 8-9. It then suggests that water in its various forms – groundwater, streams, lakes, etc - is essentially a generic, fungible resource it describes as "water resources." *Id.* From these premises Nestle then argues that the

[7] To be clear, this is not directed to the adequacy of the Court's factual findings and whether they could ultimately support a conclusion that MEPA has been violated. Rather, it is the failure to conduct an analysis of those findings as they relate to the standards it adopted.

impacts of its project have a "miniscule effect on state-wide water resources." *Id.* Under this erroneous logic virtually no individual impact to water resources would ever rise to the level of impairment under MEPA.

While evaluating impacts from a statewide perspective may be relevant under the circumstances of a given case, it is not the rule and is inappropriate here to the extent it ignores local environmental effects. The resources at issue – wetlands and streams – offer distinct benefits to the local environment that cannot be served by wetlands and streams on the other side of the State. If a court were to lump all "water resources" together in its analysis, as Nestle suggests, it would create the perverse result of allowing any stream or wetland to be destroyed as long as those resources – or any type of water – existed somewhere else in the State. Streams and wetlands that serve important functions in their surrounding environments would never be protected from impairment until all of the State's "water resources" were scarce. As the Supreme Court noted in *Nemeth*, a resource need not to be scarce or unique to be protected under MEPA. *Nemeth, supra* at 34. "Indeed, one of the primary purposes of the MEPA is to protect our natural resources *before* they become 'scarce.'" *Id.*

In the 1980's, panels of this Court disagreed over whether to apply a certain "perspective" to MEPA cases. Some decisions declared a statewide perspective was required when considering impairment. *E.g., Thomas Twp v John Sexton Corp*, 173 Mich App 507, 517; 434 NW2d 644 (1988) (draining an abandoned clay pit); *Kimberly Hills Neighborhood Ass'n v Dion*, 114 Mich App 495, 507; 320 NW2d 668 (1982) (development of natural area). Others disagreed and argued that a local perspective should be considered. *E.g., Rush v Sterner*, 143 Mich App 672, 680 n 1; 373 NW2d 183 (1985) (impoundment of trout stream); *City of Portage v*

Kalamazoo Co Road Comm, 136 Mich App 276, 283, n 2; 355 NW2d 913 (1984) (removal of trees).[8]

The Supreme Court has now made clear that rote use of factors is discouraged, as unthinking use of any factor can stifle the development of the common law of environmental quality. *Nemeth*, *supra* at 37. Indeed, requiring a choice between a statewide or local perspective creates a false dichotomy. Both "perspectives" are likely to be relevant in determining whether there has been or is likely to be an impairment. Conduct may cause impairment because it affects the specific resource at issue and the local environment, even if the statewide impact is minimal. A resource may possess unique characteristics locally or provide particular benefits to a local community, the loss of which would not necessarily be felt statewide. For example, the loss of wetland benefits in a highly developed area may have significant impacts even if there were relatively large areas of wetland statewide. Conversely, MEPA should protect a type of wetland or stream that is scarce statewide even if it is locally abundant. For example, if there were three high-value trout streams in the State, but they all existed in one small area, destruction of one of them would likely be considered impairment of a rare statewide resource, even if those streams remained relatively abundant from a local perspective.

Requiring a statewide perspective, particularly as described by Nestle, would so dilute potential impacts that it would be difficult, if not impossible, to show impairment. In fact,

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[8] On remand, in *Preserve the Dunes v Michigan Dep't of Environmental Quality*, 264 Mich App 257; 690 NW2d 487 (2004), this Court found that the unique statute it was directed to apply – the Sand Dune Mining Act – dictated that removal of a dune formation itself through mining should be evaluated by reference to the total "critical dune areas" in the state. The Court, however, went on to evaluate other impacts – to wildlife, plants, etc. – without prescribing a particular "perspective." Thus, contrary to Nestle's assertions, the Opinion does not support a rule requiring application of a statewide perspective.

forcing a choice between any particular perspective is inconsistent with *Nemeth*. Instead, it is appropriate to evaluate the local and statewide impacts.

Assuming Parts 301 and 303 are relevant to the MEPA analysis in this case, both statutes contemplate evaluation of both the impacts to the individual resources at issue and their immediate environs, as well as to resources statewide. Part 301 directs the DEQ to "consider the possible effects of the proposed action upon *the* inland lake or stream and upon waters from which or into which its waters flow and the uses of all such waters." MCL 324.30106 (emphasis added). Similarly, while acknowledging the interconnections between wetlands and other water resources statewide, Part 303 permitting criteria require evaluation of local impacts, including:

> (d) The probable impact of each proposal in relation to the cumulative effect created by other existing and anticipated activities *in the watershed*.
>
> * * *
>
> (g) The amount of remaining wetland in *the general area*.
>
> * * *
>
> (i) Economic value, both public and private, of the proposed land change to *the general area*. [MCL 324.30311(2)(d), (g), and (i) (emphasis added).]

MEPA does not require that a "statewide" or any other perspective be applied in evaluating potential impacts to the environment. Instead, the impact to both the local environment, as well as the State's overall resources should be relevant concerns. To the extent Parts 301 and 303 provide potentially relevant standards, the impacts to the local environment should be considered.

Conclusion and Relief Sought

The Circuit Court correctly held that DEQ's previous interpretation of § 30102(d) of Part 301 of the NREPA was inconsistent with and restricted the scope of that provision. A permit under Part 301 is required if an activity will diminish an inland lake or stream, which, according to its plain meaning, means any activity that reduces the level or volume of an inland lake or stream. This Court should affirm the Circuit Court's interpretation of this provision of Part 301.

The Circuit Court failed to apply the proper test in analyzing the respective rights of the parties to this case – a groundwater user and a surface water riparian. This Court should make clear that water-use conflicts between surface and groundwater users should be resolved through application of the balancing test that has developed in cases deciding both groundwater and surface water disputes. The Restatement Torts, 2d should only be used to the extent it reflects principles already developed in Michigan cases. This issue should be remanded to the Circuit Court with direction to apply the balancing test to its existing factual findings.

Finally, the analysis undertaken by the Circuit Court in reaching the conclusion that Nestle's activities violated MEPA is not apparent. The Court must clarify its use of Parts 301 and 303 in light of the Supreme Court's decision in *Preserve the Dunes*, *supra*. Further, a complete MEPA analysis would require that the specific statutory criteria to be used as standards be analyzed by reference to the relevant facts. The Circuit Court neither provided such an analysis nor did it support its conclusion that Nestle had failed to demonstrate the available defenses under MEPA. Accordingly, the MEPA issue should be remanded to the Circuit Court

for additional analysis. On remand, the Court should evaluate the potential pollution or impairment in light of both the local and Statewide impact to the natural resources at issue.

Respectfully submitted,

Michael A. Cox
Attorney General

Thomas L. Casey (P24215)
Solicitor General
Counsel of Record

S. Peter Manning (P45719)
Sara R. Gosman (P66907)
Assistants Attorney General
Environment, Natural Resources,
and Agriculture Division
525 West Ottawa Street
P.O. Box 30755
Lansing, MI 48909
(517) 373-7540

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